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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

WILY *v.* WILY.

1917
Oct. 26.

Restitution of Conjugal Rights—Jurisdiction—How far Cohabitation enforceable.

An offer by a husband to live under the same roof with his wife, each party being free from molestation by the other, is not an offer of matrimonial cohabitation and is no defence to a suit for restitution of conjugal rights.

THIS was a wife's petition for restitution of conjugal rights.

The parties were married on August 6, 1904. They lived together for some years, but afterwards separated, and the wife returned to the work of nursing in which she had been engaged before her marriage. In December, 1916, while the parties were still separated and the wife was nursing in a military hospital, she wrote to her husband a letter containing the following passages: "....Now I want to talk to you. My time here will be up in a couple of months, and I feel I shall have quite done my bit towards the war. If I leave

1917

WILY v. WILY.

here I would willingly give it up if I thought by doing so we could make a fresh start. You know we were quite happy at the beginning of our married life, so why could we not be so again ? If you would only make me welcome and treat me as your wife should be treated I would be only too thankful to get back to Broadhampton or wherever else you thought of moving to. You are still my husband, dear, and I should love to be with you as I ought to be. You know how much I still love you, and I cannot think you have no affection left for me. What do you think about it ? . . . . I am very busy with new cases, preparing for Xmas. and so on, and may not have time to write more than a line again before Xmas. I hope you will have a very happy one, dearest."

Receiving no answer to this letter, she wrote again to her husband in January, 1917, in similar terms asking her husband to take her back, and on February 4, 1917, her husband sent the following reply :

" In answer to your letter I perceive the time has arrived for plain speaking, and I trust that what I have to say will not cause you pain. Should you desire to give up your work at the hospital and return to me, I will decidedly give you the shelter and protection of my home. But I cannot and will not, under any circumstances, cohabit with you on terms of our early married life. I have lost all affection for you, and when I recall the petty acts of jealousy, espionage and habitual discussion with others concerning me, I realise that it is impossible to make a fresh start. You shall have your room without the slightest molestation from me and I must be immune from every molestation from you. If this does not appeal to you I am ready even to go so far as to enter into a separation deed making you a suitable allowance. The choice is with you. Should you favour the latter course my solicitors will prepare a suitable deed and I wish to add they will not be a local firm."

On this correspondence the wife obtained leave to file the present petition, alleging her husband's refusal to cohabit. The husband by his answer denied that he had refused.

The husband was called and stated that he was quite willing to live with the petitioner and treat her as his wife, but he had no affection for her.

W. O. Willis, for the petitioner. A husband is bound to treat his wife with conjugal affection: *Gill* v. *Gill* (1), referred to in the judgment in *Orme* v. *Orme*. (2) The offer in his letter does not comply with his duty.

Elsley Zeitlyn, for the respondent.

HILL J. This is a difficult case, but the conclusion at which I have arrived is that I ought to make the decree asked for. The respondent now says that he is prepared to cohabit with his wife and live under the same roof with her and treat her as a wife, but that he has no affection for her. If it is so, and if, as no doubt is the case, the law cannot compel sexual intercourse, he will be able to comply with all that the decree of the Court can enforce. It is not denied to-day that he is willing to do so, but the material question is what his attitude was when he wrote the letter dated February 4, 1917, in answer to his wife's letter written before the petition was filed.

He does not go nearly so far now as he did then. Had he confined himself then to the offer of "the shelter and protection of his home" that would have been sufficient, but he went on to speak of being immune from every molestation. Now *Forster* v. *Forster* (3) lays down that though "the duty of matrimonial intercourse cannot be compelled by the Court, matrimonial cohabitation may"; and if the denial of that was intended by the expression used in the letter, as I think it was, there was in my opinion a refusal to render conjugal rights at that time. I think that there was a refusal by him at the date of his letter. *Weldon* v. *Weldon* (4) does not cover the case, because there the distinction was between willingness to cohabit under the same roof and the offer of a separate establishment. I do not, however, think that even willingness to live under the same roof is per se sufficient, having regard to the decision in *Gill* v. *Gill* (5), referred to in *Orme* v. *Orme*. (6) There must be something more and the wife must be treated as a wife.

(1) (1823) Unreported.
(2) (1824) 2 Add. Eccl. 382.
(3) (1790) 1 Hagg. Con. 144, 154.
(4) (1883) 9 P. D. 52.
(5) Unreported.
(6) 2 Add. Eccl. 382, 384, 385.

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The husband now says in effect that he is prepared to do that. I think that the decree ought to go.

Solicitors for petitioner: *Elvy Robb & Welch.*
Solicitors for respondent: *De La Chapelle & Co.*

J. R. B.

1917
Nov. 8.

IN THE ESTATE OF EUGENE COCQUEREL, DECEASED.

Probate—Naturalized British Subject—Death in Foreign Country—Domicil—English Will—No Grant of Administration in Foreign Court—Wills Act (Lord Kingsdown's Act), 1861 (24 & 25 *Vict. c.* 114), *s.* 2.

Where a British subject dies in a foreign country, having left a will executed in England in the English form, the case is within Lord Kingsdown's Act, 1861, s. 2, and the executor appointed by the English will is entitled to probate without regard to the domicil of the deceased. If an order has been made by a foreign Court appointing persons to administer the estate, the English Court will not grant probate so as to conflict with such an appointment; but this rule applies only if an actual order has been made, not when proceedings have been commenced in the foreign Court but no order made.

In the Goods of Meatyard [1903] P. 125 distinguished.

EUGENE COCQUEREL, the deceased, was born in France of French parents in the year 1838. He came to England in 1858 and resided and carried on business in London until November, 1905. On July 6, 1871, he took out a certificate of naturalization in England which was never abandoned or abrogated. He married an English lady in England. She died in November, 1905. Shortly afterwards the testator turned his English business into a limited company and returned to France, where he purchased a freehold property and resided on it, with the exception of short visits to London, until his death, which took place on June 10, 1917. He had married again in France, and his second wife survived him.

He left a will dated May 22, 1914, in which he described himself as of London House, Boves, Somme, in the Republic of France, residing temporarily in England, declared that he was ordinarily resident in France, but naturalized in England, and directed that his will should

be construed according to English law. He appointed executors, one of whom desired to act. The will was in English form, prepared by an English solicitor. It disposed of his property without regard to the fixed portions to which his children might be entitled in French law. He also made a codicil and a separate French will, which were not material to the questions raised.

The testator left real and personal property both in England and France, but his property in England was of considerably more value than that in France.

One of his daughters, who resided in France, commenced proceedings in the French Court alleging that his domicil was French at the time of his death and asking for the appointment of a receiver to administer his estate. No order of any kind had been made by the French Court.

A caveat was entered in this Court on her behalf. The English executor took out a summons for stay of contentious proceedings arising on the caveat and to have probate granted to him in common form. The registrar on October 4, 1917, made an order as asked. The daughter appealed and the summons was adjourned into Court.

Expert evidence was given that according to French law the English executor could not administer the whole estate in France.

Bayford, for the summons. On the evidence the testator's domicil at the date of his death was French. He obtained naturalization in England in 1871, but that is in no way conclusive as to domicil.

The French practice is that on the application of any of the next of kin a receiver is appointed who can deal with the whole estate. Proceedings have been commenced to procure such an appointment, and this Court will not interfere with them by appointing an executor who cannot deal with the whole estate: *In the Goods of Meatyard* (1); *In the Goods of Briesemann* (2); *In the Goods of H.R.H. the Duchess of Orleans* (3); *In the Goods of Earl* (4); *In the Goods of Von Linden.* (5)

In the Goods of Cosnahan (6) may be relied upon by the respondent, but it is distinguishable.

(1) [1903] P. 125.
(2) [1894] P. 260.
(3) (1859) 1 Sw. & Tr. 253.
(4) (1867) L. R. 1 P. & M. 450.
(5) [1896] P. 148.
(6) (1866) L. R. 1 P. & M. 183.

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COCQUEREL, *In re.*

[THE PRESIDENT referred to Lord Kingsdown's Act (24 & 25 Vict. c. 114), s. 2.]

Hume-Williams, K.C., and *H. D. Grazebrook*, for the respondent. It has not been proved that the testator's domicil was French; probate to the executor will not prevent the raising any question as to domicil.

[THE PRESIDENT. I think that domicil is immaterial in cases within the statute.]

In all the cases cited there had been an actual appointment by the Court of the domicil of some one to administer the estate. Here there has been no such appointment. It has not even been asked for. The appellant has merely given notice of proceedings in which it may be asked for.

Bayford in reply.

THE PRESIDENT (SIR SAMUEL EVANS). I think that this case is distinguishable from *In the Goods of Meatyard*. (1) There the foreign Court had appointed persons to act in the administration of the deceased's estate, and this Court declined to interfere with the persons so appointed. In this case proceedings have at last been commenced in a foreign Court, but no order of any kind has been made. It appears to me that the case comes within Lord Kingsdown's Act (24 & 25 Vict. c. 114), s. 2. I find that the testator was a British subject at the date of his will and of his death, and, therefore, his will, being made in proper English form, can be proved in this Court whatever his domicil was. The registrar's order must be affirmed. The costs of all parties will be paid out of the estate.

Solicitors for appellant: *Denton, Hall & Burgin.*

Solicitors for respondent: *Ince, Colt, Ince & Roscoe.*

(1) [1903] P. 125.

J. R. B.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

1917
Nov. 1, 15.

THE ALGOL.

[1917, fol. 363.]

Admiralty—Collision—Navigating without Lights—Admiralty Directions—Danger of Enemy Submarines—"Dangers of Navigation and Collision"—"Special circumstances" rendering Departure from the Rules necessary—Regulations for Preventing Collisions at Sea, arts. 1, 2, *and* 27.

In accordance with Admiralty directions, two neutral steamships which came into collision in the English Channel were, owing to the danger of German submarines, navigating without exhibiting any under-way lights. Both ships had their side lights lighted and ready to be exhibited, and neither was guilty of any delay in exhibiting a side light after becoming aware of the presence of the other ship.

The plaintiffs, the owners of the cargo laden on one of the ships which sank in consequence of the collision, alleged that to navigate without lights, even under Admiralty directions, constituted negligence and a breach of arts. 1 and 2 of the Regulations for Preventing Collisions at Sea:—

Held, that the regulations must be read as a whole; that the complete disregard by the Germans of all rules of international law and of the practice of civilized people in the conduct of war had brought into existence a new danger of navigation in an area of the high seas in which the vessels were navigating; and that in navigating with their lights screened, both vessels were doing what was justified and required by art. 27, under which they were bound to have "due regard to all dangers of navigation and collision."

Action of Damage by Collision.

The plaintiffs were the owners of a cargo of coal lately laden on board the Norwegian steamship *Embla;* the defendants were the owners of the Russian steamship *Algol.*

The action was heard in camera. The facts and arguments, so far as proper for publication, are stated in the judgment.

1917. Nov. 1. *Laing, K.C.*, and *D. Stephens*, for the plaintiffs. *Bateson, K.C.*, and *Dumas*, for the defendants.

Cur. adv. vult.

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THE ALGOL.

Nov. 15. HILL J. read the following judgment:—I heard this case in camera, but I see no objection to the publication of the judgment. As the case raises a question of general importance, it would be unfortunate if the mere result were reported without the reasons. I think the reasons ought to be published, and I see no reason why they should not be. But this permission applies only to the judgment.

This is a claim by the owners of cargo lately laden on board the steamship *Embla* against the owners of the steamship *Algol*. The *Embla* and the *Algol* were in collision in the English Channel (outside territorial jurisdiction) on the night of March 16, 1917, and the *Embla* in consequence sank with her cargo. The *Embla* was a Norwegian ship, the *Algol* a Russian ship.

The *Embla* was a wooden screw steamship of 497 tons gross, 162 feet long, and was laden; the *Algol*, a steel screw steamship of 2222 tons gross, 280 feet long, was light. The night was fine and clear, but dark. The *Embla*, at the time she sighted the *Algol*, was on a course of S.E. by S. magnetic, making about seven knots. The *Algol*, at the time she sighted the *Embla*, was on a course of N. $\frac{1}{2}$ W. magnetic, making about nine and a half knots. In fact, the ships were crossing ships, and the *Embla* had the *Algol* on her starboard side. The vessels came into collision, the stem of the *Embla* striking the port side of the *Algol* about abreast of No. 1 hatch, the angle of the blow leading somewhat aft on the *Algol*.

There is no very great conflict as to the facts except as to the distance at which the vessels were sighted, and the order in which each displayed its side light. Neither ship had her masthead or side lights exhibited, and neither at any time showed her masthead light. The *Embla* had her side lights in position, but screened with a canvas covering, which could be readily torn away. The *Algol* had her side lights lit and placed on the bridge, hidden by the wind screens and ready to be lifted into the screens, an operation which could be as promptly done as the tearing away of the canvas covering from the *Embla's* lights. Each ship had received directions by the Admiralty authorities not to carry the masthead and side lights exhibited, but to show them only in case of emergency to avoid collision. The precise terms of the directions to the *Algol* were not proved, but I have no doubt that that was their effect.

The story as told by the mate of the *Embla*, who was in charge, was that he saw the *Algol* as a dark object two or three points on the starboard bow and some two or three lengths, i.e., 160 to 220 yards, away, and the *Algol* was apparently proceeding in an opposite direction; that he hard-a-starboarded and tore away the covering of his green light; that immediately afterwards he saw the red light of the *Algol*, one to two lengths away; that he reversed full speed astern and gave three blasts and the collision happened. The engineer said the engines were just beginning to go astern at the moment of collision. The look-out saw the loom of the *Algol* but did not report it, waiting to make out what it was, and a few seconds after seeing the loom he saw the red light of the *Algol*. When he saw the loom the ships appeared to be crossing ships.

The story as told by the second mate of the *Algol*, who was in charge, was that he saw the loom of the *Embla* about three-quarters of a mile away, two to three points on the port bow, and received a report from the look-out; that he looked with his glasses, and, making out the ship, placed his red light in the screen and shortly afterwards saw the *Embla's* green light at a distance which he reckons at half a mile; that he kept course and speed, but very shortly afterwards, seeing that a collision was inevitable, he reversed full speed astern and hard-a-ported. The engineer says the engines were just working astern at the collision.

The conclusions of fact I have arrived at are that the distance at which the *Algol* saw the *Embla* was not so great as three-quarters of a mile, but it was considerably more than the 220 yards or so at which the *Embla* says she saw the *Algol*. I think, on the evidence as a whole, it was probably something between a quarter and half a mile, a distance which the joint speeds would cover in one to two minutes. I think, also, that it is probable that the *Algol* exhibited her red light before the *Embla* exhibited her green, but that the two lights were exhibited very much about the same time; and the collision happened very shortly afterwards.

I do not think that either ship can be found guilty of delay in exhibiting her side light after she became aware of the other ship.

The plaintiffs have to establish that the loss of their cargo was due to the negligence of the defendants' servants on board the *Algol*, and if that were established it would still have to be considered

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whether it was not also caused by the negligence of those on board the *Embla*, and, if so, what the proportions of blame were.

The conclusion I have arrived at is that, unless the failure to carry lights by the *Algol* was negligence, and negligence contributing to the collision, this collision was solely caused by the fault of the *Embla*. In the first place, the officer in charge of the *Embla* was not aware of the *Algol* so soon as he ought to have been, owing to the neglect of the look-out to report the loom of the *Algol* immediately he saw it. In the next place, his helm action was wholly wrong. It would have been hazardous, even if he had been entirely ignorant as to the direction in which the *Algol* was travelling, but it was altogether wrong when he knew that the *Algol* was approaching, even if he did not appreciate, as the look-out appreciated, that the courses were crossing, with the *Algol* on his starboard hand. If he appreciated it, it was doubly wrong. In the next place, if helm action is taken to a vessel in such circumstances as these, it is imperative that that action should be indicated by the proper sound signal, and none was given. And, lastly, the *Embla* had another vessel on the starboard bow, and that vessel approaching. Even if there was nothing to show definitely that the courses were crossing, yet there was a probability that they might be crossing, in which case the *Embla* was the give-way ship. In such circumstances the engines ought to have been reversed and way taken off at once.

These conclusions are in accordance with the views of the Elder Brethren, whose assistance I have had, and with whose advice I entirely agree. I find that the *Embla* was undoubtedly to blame for the collision.

The question remains whether the *Algol* was also to blame. Four charges were made. The first is that there was a bad look-out. I find that the look-out on board the *Algol* was good. Secondly, that the *Algol* ought to have seen that the *Embla* was part of a convoy, and have either shown lights to the convoy or signalled to it, or taken steps to keep clear of it. No duty in this respect can be upon the *Algol* unless those on board knew, or ought to have known, that the *Embla* was part of a convoy. I find that they did not know, and that there was nothing to tell them, that the *Embla* was part of a convoy. They had seen ships on their starboard hand and starboard bow. The *Embla* had, in fact, started in convoy with those

ships, but she was the slowest ship of the convoy, and had evidently dropped behind, and was in fact not seen till twenty or twenty-five minutes after the other ships of the convoy. I find no duty upon the *Algol* to anticipate that after the convoy had passed there was a straggler following at such an interval. The third charge was of not reversing soon enough. The *Algol* was the stand-on ship. I find that she reversed in proper time.

This leaves the fourth point, which under war conditions is of very general importance, namely, whether the *Algol* is to blame for navigating without lights. Of course, if the *Algol* is to blame for navigating without lights, the *Embla* must be to blame on the same ground.

The conclusion at which I have arrived is that, in the circumstances of the time and place of this collision, neither vessel was negligent in carrying her lights as they were carried, that is to say, not exhibited but ready to be exhibited.

By an Order in Council, made under s. 424 of the Merchant Shipping Act, 1894, the Collision Regulations have been applied to the ships of Norway and Russia. That Order in Council directs that the regulations shall apply to the ships of Norway and of Russia, whether within British jurisdiction or not, and that such ships shall, for the purpose of such regulations, be treated as if they were British ships. This Court must therefore treat them as applicable to each of the ships at the time of the collision.

The collision happened before June 9, 1917, and it would therefore be immaterial to consider the effect of the Order of the Lords Commissioners of the Admiralty made on that date under the Defence of the Realm Regulations (1), even if that Order be applicable to foreign ships outside the jurisdiction.

(1) This Order (Admiralty Notice to Mariners, No. 581) provides that the orders contained in Admiralty War Instructions for British Merchant Ships, or in any instructions or advice given to masters of vessels by British or allied naval officers or by other duly authorized officers or officials, as to routes to be taken and precautions to be observed to avoid capture or destruction by the enemy, "are to be observed even when they are in conflict with the provisions of the Regulations for Preventing Collisions at Sea, and every vessel observing such regulations, instructions or advice shall be deemed to be taking measures to meet 'special circumstances' within the meaning of art. 27 of the Regulations for Preventing Collisions at Sea."

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Prima facie the *Algol*, like the *Embla*, was not complying with the regulations. She was not carrying lights, as required by arts. 1 and 2. But the articles must be read as a whole, and they include art. 27. In obeying arts. 1 and 2 the *Algol* was by art. 27 bound to have due regard "to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Now the war, and the complete disregard by the Germans of all rules of international law and of the practice of civilized peoples in the conduct of war, had brought into existence at the time of, and before, this collision a new danger of navigation in an area of the high seas which certainly included the area in which the *Algol* and *Embla* were navigating, and to that danger all ships, not merely of the allies but of neutrals, the *Embla* no less than the *Algol*, were exposed. Having regard to that danger, the Admiralty authorities, who were most concerned in securing the safety of ships passing between England and France from all dangers, whether of submarine attack or of collision, had recommended that lights should be carried only as they were in fact carried. The *Embla*, which was sailing under convoy, would have been permitted to join the convoy under no other conditions. The *Algol* was not under convoy, but was one of a number of ships which were crossing the Channel that night, and she was acting under that advice. The advice was applicable to the locality in which the ships were navigating, as clearly appears from the fact that the *Embla* was under convoy and received the advice.

The experience of this Court has taught me that this advice has been very generally followed by seamen. If it be a question for the Elder Brethren, they tell me that to act in accordance with that advice at the time and place in question was to act as a prudent seaman would act, and I entirely agree. I hold that in carrying their lights as they did at the time and place in question both ships were doing that which was justified, and, indeed, called for by a due regard to the dangers of navigation, and that they were not negligent. The present is not a case in which the masters were setting up their own judgment against a positive direction of the regulations, but one in which a decision as to the best way of avoiding the dangers of the voyages in question had been arrived at by those best

qualified to judge, and acted upon by navigators very generally. It is said that in carrying no lights the ships were only seeking their own safety, and ought not to be permitted to do so at the risk of others. But, in truth, if the *Algol* had been carrying her lights exhibited she might have acted as a beacon to a submarine, and have endangered not only herself but all others in her neighbourhood. It is too narrow a view to say that she carried no lights for her own safety only.

I have so far based my decision on the words "due regard shall be had to all dangers of navigation." I prefer to rest it there, without deciding whether at the time and place in question the risk of submarine attack was a circumstance which rendered a departure from arts. 1 and 2 necessary in order to avoid immediate danger. I incline, however, to the opinion that at the time and place in question the risk of submarine attack ought to be regarded as so imminent as to constitute immediate danger, and a special circumstance within the second branch of art. 27; and, if so, I think that the departure from arts. 1 and 2, being recommended by the Admiralty authorities and generally adopted, ought to be treated as a departure necessary in order to avoid that immediate danger.

In view of what I have said, it is unnecessary to decide the further point urged for the defendants, namely, that even if it was negligent of the *Algol* to be navigating without lights, yet, even so, those on board the *Embla* could by the exercise of reasonable skill and care have avoided the *Algol*, and that therefore the failure to carry lights was not in any degree a cause of the collision.

It is equally unnecessary to say what, if the *Algol's* failure to carry lights was negligence contributing to the collision, would be the proper proportions of blame, though it will be obvious from what I have said that I should, in that event, have held the *Embla* very much more to blame than the *Algol*.

The result is that there will be judgment for the defendants with costs.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Pritchard & Sons.*

E. C. T.

1917
Nov. 20, 22.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE ANDONI.

[1916, fol. 673.]

Admiralty — Collision — Compulsory Pilotage — Shatt-al-Arab (Basra River)—Pilotage Order issued by Commander of Army of Occupation —Waters under British Control—Pilot compulsorily in Charge of Navigation—Onus of Proof.

The defendants' steamship, while in charge of a pilot, ran into and damaged the plaintiffs' steamship which was lying at anchor in the Shatt-al-Arab (Basra river). It was admitted that the collision was solely the fault of the pilot, and that he was on board by reason of notices intimating that pilotage was compulsory in the river. The notices were issued by reason of an order made by the Army Commander in Mesopotamia notifying compulsory pilotage for the river. At all material times the Turkish territory on the bank of the Shatt-al-Arab from the mouth of the river to above Bussorah was in the military occupation of the British troops:—

Held, that the military commander of an army of occupation had authority to issue orders for the safety of his means of communication, and therefore to make pilotage orders in respect of the navigation of the river, and that the pilot was on board by compulsion of the Army Commander. The burden of proof therefore shifted, at any rate in waters under British control, and it was for the plaintiffs to show that, though compulsorily on board, the pilot's function was not to take charge but merely to advise the master. The plaintiffs had not discharged that onus, and the defence of compulsory pilotage therefore succeeded.

Action of Damage by Collision.

Issue as to compulsory pilotage.

The plaintiffs were the Strick Line, Limited, the owners of the steamship *Seistan;* the defendants were the Elder Line, Limited, the owners of the steamship *Andoni.*

The collision took place about 3 P.M. on November 7, 1916.

The *Seistan*, a vessel of 4238 tons gross, was lying at anchor in the river Shatt-al-Arab (Basra river), about off Abu Kassib, when she was run into by the *Andoni*, a vessel of 3188 tons gross, which was bound up the river with a cargo of coal. The defendants

admitted that the collision was caused by the negligent navigation of the *Andoni*, but they alleged that she was in charge of a duly licensed pilot for the river by compulsion of law, and that the negligence was solely that of the pilot. By their reply the plaintiffs denied that the *Andoni* was in charge of a pilot by compulsion of law. This issue was tried on certain admitted facts which are summarized in the head-note and are set out in full in the judgment.

1917. Nov. 20. *Aspinall, K.C.*, and *Dumas*, for the defendants. The negligence was that of a person forced upon the defendants by an order of the competent military authority. The pilot was not the servant of the defendants, and they are not liable for his negligence: *The Penrith Castle.* (1) A pilot compulsorily taken on board a vessel, according to British law, is taken on board to conduct the vessel: see the Merchant Shipping Act, 1894, s. 742; and, if he has to conduct the vessel, he is compulsorily in charge of the navigation and the defendants are not liable for his wrongful acts: *The Nord.* (2) The Basra river was in British control and the *Andoni* was a British ship; and, according to the general rule, the law follows the flag. The defendants have proved that the pilot was compulsorily on board, and it is for the plaintiffs to show that he was on board merely in an advisory capacity: *The Augusta.* (3) [Reference was also made to *The Guy Mannering* (4) and *The Agnes Otto.* (5)]

Laing, K.C., and *D. Stephens*, for the plaintiffs. The notices issued in accordance with the order of the Army Commander do not state that the pilot is bound to take charge of the vessel. Further, if the order purports to make pilotage compulsory in the sense that the pilot is to be in charge of the navigation and the shipowners freed from responsibility, it is ultra vires. The Defence of the Realm Regulations do not empower an army commander to make such an order. Except where so provided by statute, it does not follow that whenever a pilot is compulsorily on board a British ship he is compulsorily in charge: *Steamship Beechgrove Co.* v. *Aktieselskabet "Fjord" of Kristiania.* (6) The onus of proving that pilotage

(1) [1917] P. 209.
(2) [1916] P. 53.
(3) (1887) 6 Asp. M. L. C. 161.
(4) (1882) 7 P. D. 52, 132.
(5) (1887) 12 P. D. 56.
(6) [1916] 1 A. C. 364.

1917

THE ANDONI.

is compulsory lies on the persons alleging it : *Clyde Navigation Co.* v. *Barclay.* (1)

Cur. adv. vult.

Nov. 22. HILL J. read the following judgment :—In this case the *Andoni,* under way, was in collision with the *Seistan,* at anchor. on November 7, 1916, in the Shatt-al-Arab, below Bussorah, about off Abu Kassib. It is admitted that the collision was caused by the negligent navigation of the *Andoni.* The defendants say that, notwithstanding that, they are not liable because the fault was the fault solely of a pilot who was compulsorily in charge of the navigation. The onus is upon the defendants. The case was tried on admissions. The following facts are admitted : (1.) that the collision was solely caused by the negligence of the pilot on board the *Andoni ;* (2.) that the said pilot was duly licensed for the waters in which and where the collision occurred ; (3.) that the said pilot was directing the navigation at all material times ; (4.) that the Lords Commissioners of the Admiralty on September 19, 1916, issued a Notice to Mariners, No. 1042 of 1916, which contains the following :—

" PERSIAN GULF.

" Shatt-al-Arab (Basra River).—Compulsory Pilotage.

. . . . . .

" Details.—Mariners are warned that pilotage in the Shatt-al-Arab is compulsory. Pilots are at present stationed on the Shatt-al-Arab light-vessel off the river entrance, from which the pilot flag is flown on the approach of any vessel. The following cautionary note is to be inserted on the charts : ' No vessel is allowed to cross the outer bar without a pilot.'

. . . . . .

" Authority.—Bombay Notice, No. 116 M. of 1916."

(5.) That the Director of the Royal Indian Marine, on July 24, 1916, issued the following Notice, No. 116 M. of 1916 :—

" PERSIAN GULF.

" Shatt-al-Arab River.—Compulsory Pilotage.

" Shipping is hereby warned that pilotage in the Shatt-al-Arab or

(1) (1876) 1 App. Cas. 790.

Basra river is compulsory, and that no vessel is to attempt to cross the Outer Bar without a pilot except by special order.

. . . . . .

"Authority.—The Director of the Royal Indian Marine, Bombay."

The Notice is signed by the Director of the Royal Indian Marine.

(6.) That the pilot was on board by reason of such notices.

A copy of a letter of May 24, 1917, from the Director, Royal Indian Marine, to the Secretary to the Government of India, Marine Department, is also admitted. The letter is as follows: "In reply to your letter No. 6904, dated May 11, 1917, relative to an action pending in the Admiralty Division between the owners of the steamship *Andoni* and the owners of the steamship *Seistan*, I have the honour to inform you that the Director of the Royal Indian Marine is the issuing authority for all notices to mariners in Indian waters. The order notifying compulsory pilotage for the Shatt-al-Arab river was made by the Army Commander in Mesopotamia, and the same being communicated to me by the Senior Maritime Transport Officer, Basra, I issued the Notice to Mariners for the general information of the maritime community." On the evidence of this letter, I find that the Army Commander in Mesopotamia had made an order notifying compulsory pilotage for the Shatt-al-Arab river.

Those are all the facts. Two points have been argued. First, it is said for the plaintiffs that the defendants have not proved that there was any compulsion to put the pilot in charge of the navigation; that it is quite consistent with the admitted facts that he was to be taken on board in an advisory capacity; and that it is for the defendants to prove that the master at the time and place in question was compelled to allow the pilot to direct the navigation. Secondly, it was argued that there is no evidence on which the Court can find that the Army Commander in Mesopotamia had authority to make an order compelling shipmasters to hand over the navigation to the pilots.

As to the second point, I think the Court must take notice that at the time in question Turkish territory on the bank of the Shatt-al-Arab, from the mouth to a point further up than Bussorah, was in the military occupation of the British troops, and was therefore under the military administration of the commander of the British troops. And, whatever the limits of the authority of the military commander

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of an army of occupation, this at least must be included, that he has authority to make orders for the safety of his means of communication. His principal means of communication was the Shatt-al-Arab. I entertain no doubt that he had authority to make orders relating to the navigation of ships proceeding up the Shatt-al-Arab, and, if he thought fit, to order the masters of such ships to put the navigation into the charge of pilots, and that obedience to such orders had for sanction the penalties which the military commander of an army of occupation can inflict.

I hold that the pilot was on board the *Andoni* by compulsion of the Army Commander, which was, in my view, compulsion of law. But in any case it was a compulsion in fact.

As to the first question, as to whether the pilot was by compulsion not merely on board but in charge of the navigation, it is not very satisfactory that the Court has to try this case without having before it the precise terms of the order of the Army Commander. The parties, however, have chosen to try the case upon the admitted facts and documents, and I must make the best of them. The question, I think, is one of fact, namely, was this pilot, who was by compulsion on board and who was actually directing the navigation, as admitted —was he in fact entitled to supersede the master and take charge of the navigation, and was the master bound to permit him so to do ?

In my opinion a pilot, in the mouths of British authorities, prima facie means, to use Lord Tenterden's words, " A person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port."

And where you find that pilotage is compulsory, that, prima facie, means, in the mouths of British authorities, that the pilot is entitled, and the master is bound to permit him, to conduct the ship, that is, to take charge of the navigation of the ship. That is the prima facie meaning, and when it is shown by defendants that pilotage is declared to be compulsory, at any rate in waters under British control, the burden of proof is shifted, and it is for the plaintiffs to show that though compulsory, yet the pilot's function is not to take charge, but to advise. In cases like *The Augusta* (1) and *The Guy Mannering* (2) evidence was given upon which the plaintiffs discharged the onus so shifted upon them. In the present case

(1) 6 Asp. M. L. C. 161. (2) 7 P. D. 52, 132.

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there is nothing beyond the fact that a competent British authority has declared pilotage to be compulsory in waters over which that authority had control, unless it be the fact (which at any rate does not help the plaintiffs) that the pilot was actually directing the navigation. I hold upon the evidence before me that the pilot was by compulsion in charge of the navigation.

The defence of compulsory pilotage therefore succeeds, and, as there was no other issue on the pleadings, there must be judgment for the defendants with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Lawrence, Jones & Co., for Forwood, Williams & Grindrod, Liverpool.*

E. C. T.

(In Prize.)

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Jan. 29;
Feb. 2;
Nov. 5;
Dec. 12.

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[1916, No. 1031.]

Prize Court—Neutral Flag—Ship owned by Company registered in Neutral Country—Company under Enemy Control—Declaration of London, 1909, *art.* 57.

A vessel nominally owned by a duly registered Dutch company, and flying the Dutch flag, was seized as prize on the ground that she was in fact owned and controlled by enemies of the Crown. The whole of the share capital of the company was held by two other companies registered in Holland, the V. T. Company and the V. C. Company. All the shares in the V. T. Company were held by companies registered in Germany, and all the directors and shareholders were enemies resident in enemy territory. All the shares in the V. C. Company were held between the V. T. Company and two other companies registered in Germany. All the directors and shareholders of these companies were Germans. The V. T. Company were the managers of the vessel, and they acted in part through two Germans resident in Holland:—

Held, that, it being a settled rule of prize law that a Prize Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying or entitled to fly, the Court had to determine whether the true character of the vessel

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was Dutch or German ; that on the facts she was a German vessel, and, although owned by a company nominally Dutch, was really enemy property and must be condemned.

SUIT FOR CONDEMNATION OF A SHIP AS PRIZE.

On October 27, 1915, the *Hamborn*, a steamship of 1229 tons gross, flying the Dutch flag, whilst on a voyage from New York to Cuba with general cargo, was captured by one of His Majesty's ships. The *Hamborn* had left New York on October 26 and was running under time charter with an American firm of shipowners. She was taken into Halifax, Nova Scotia, where a writ in prize was issued on October 31, 1915. On February 23, 1916, an order was made transferring the proceedings to the High Court of Justice in England.

The owners of the vessel, the Namlooze Venootschap Maatschappij Stoomschip Hamborn (hereinafter called the Hamborn Steamship Company), of Rotterdam, claimed that the *Hamborn* was a Dutch vessel and therefore not subject to condemnation as prize.

The *Hamborn*, then the Norwegian steamship *Trim*, was purchased on September 23, 1913, by the Handels-en-Transport Maatschappij Vulcaan, a Dutch limited company (hereinafter called the Vulcan Transport Company), with an office at Rotterdam, and a single ship company, the Hamborn Steamship Company, was formed. The capital was 30,000 fl. divided into thirty shares of 1000 fl., whereas the cost of purchasing the vessel and forming the company was 217,013 fl., and it appeared that the vessel was in fact owned by the Vulcan Transport Company, who were the managers of the vessel and held fifteen of the thirty shares. The other fifteen shares were held by another Dutch company, the Vulcaan Kolen Maatschappij, of Rotterdam (the Vulcan Coal Company).

The Vulcan Transport Company had a capital of 1,000,000 fl. divided into 1000 shares, of which a German company or association, the Gewerkschaft Deutsche Kaiser, of Hamborn, Bruckhausen, Germany (the Kaiser Company), owned 998 and Thyssen & Co., of Mülheim, the remaining two shares. All the directors and shareholders of the Kaiser Company (except one, who was a Hungarian) were Germans resident in Germany.

The Vulcan Coal Company had a share capital of 500,000 fl.

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divided into 500 shares, 170 of which were held by the Vulcan Transport Company and the remainder by two other Hamborn companies, the Gewerkschaft Rhein (the Rhine Company) and the Gewerkschaft Lohberg Hamborn (the Lohberg Company). The directors of the Vulcan Coal Company, with one exception, were the same as those of the Vulcan Transport Company. The directors of the Rhine Company were the same as the directors of the Lohberg Company. All of them and all the shareholders were of German nationality.

The managing committee of the Hamborn Steamship Company consisted of two persons, Carl Nalenz, who was the manager of the Vulcan Transport Company, and one Hans Groninger. Both were Germans, but were resident at Rotterdam.

1917. Jan. 29; Feb. 2; Nov. 5. *Sir Frederick Smith, A.-G.*, *Sir Gordon Hewart, S.-G.*, and *C. R. Dunlop*, for the Procurator-General. The flag that the vessel was flying at the time of capture is not conclusive, and the Court will look beyond the nominal ownership: see *The Indian Chief* (1), *The Ocean Bride* (2), the American cases of *The Fortuna* (3) and *The San José Indiano* (4), and the recent case of *The St. Tudno.* (5) In the latter case the vessel condemned was flying the British flag and was ostensibly owned by a British company; but the principle is the same whether the nominal ownership be a British or neutral company. The question is one of control: "The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character": per Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*). (6) Applying these principles, the company owning the *Hamborn* was an enemy company and the vessel should be condemned.

MacKinnon, K.C., and *Balloch*, for the claimants. The primary test of hostile connection is found in domicil: see *The Harmony* (7)

(1) (1800) 3 C. Rob. 12; 1 Eng. P. C. 251.
(2) (1854) Spinks, 66; 2 Eng. P. C. 309.
(3) (1818) 3 Wheat. 236.
(4) (1814) 2 Gall. 267.
(5) [1916] P. 291.
(6) [1916] 2 A. C. 307, 340.
(7) (1800) 2 C. Rob. 322.

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and Pitt Cobbett's International Law, 3rd ed., pt. 2, pp. 141, 142. The managers of the Hamborn Company, although German, were resident in Holland, and the connection with the enemy is far more remote than in *The St. Tudno* (1), a case which dealt with the question only as between British and enemy interests and did not involve the condemnation of property owned by a duly registered neutral company. The question is where was the actual de facto control and not the theoretical and ultimate control, which in any company must be in the shareholders. Further, by art. 57 of the Declaration of London " the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly " : see also *The Vrow Elizabeth* (2), where it was held that the neutral claimants could not deny the enemy flag. Art. 57 ceased to be applicable by an Order in Council of October 20, 1915, but the Order was not published in the *Gazette* until October 26, which was the day the *Hamborn* sailed from New York. [*The Industrie* (3) and *The Fortuna* (4) were also referred to.]

Sir Gordon Hewart, S.-G., replied.

Cur. adv. vult.

Dec. 12. THE PRESIDENT (SIR SAMUEL EVANS). It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities.

This rule, when applied to questions of the ownership of vessels, means that the Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt ; but captors as against them are not so bound. It has been said that " it is no inconsiderable part of the ordinary occupation of a Prize Court to pull off the mask, and exhibit the vessel in her true character."

The question to be determined in the present case is whether the true character of the steamship *Hamborn* was Dutch or German,

(1) [1916] P. 291.

(2) (1803) 5 C. Rob. 2, and Appendix ii., p. 410.

(3) (1854) Spinks, 54 ; 2 Eng. P. C. 297.

(4) (1811) 1 Dods. 81 ; 1 Eng. P. C. 193, n.

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or in other words whether her owners were enemy subjects or neutral subjects. She was nominally owned by a limited company registered in Holland, and was flying the Dutch flag.

Six separate companies appear upon the stage in the history of the vessel. For brevity's sake I shall call them by short English names. They are (1.) the Hamborn Steamship Company, (2.) the Vulcan Transport Company, (3.) the Vulcan Coal Company, (4.) the Kaiser Company, (5.) the Rhine Company, and (6.) the Lohberg Company. The first three of these companies were registered in Holland, the last three in Germany. The ship (formerly a Norwegian vessel) appears to have been bought by the Vulcan Transport Company. She was afterwards transferred to the Hamborn Steamship Company, which was formed as a one-ship company, and her name was changed to *Hamborn*, after a German town.

The Vulcan Transport Company were the managers of the ship. They acted in part through two men named Groninger and Nalenz, who were German subjects although said to reside in Holland. The Hamborn Steamship Company did not pay any cash to the Vulcan Transport Company for the ship. The whole of the share capital of the Hamborn Steamship Company was held in equal shares by the Vulcan Transport Company and the Vulcan Coal Company. The directors of these two last-named companies were all Germans and resident in Germany. All the shares in the Vulcan Transport Company except two were held by the Kaiser Company; the remaining two were held by Thyssen & Co., a German firm of Mülheim. The Kaiser Company was not only registered in Germany, but all its directors and shareholders were Germans resident in Germany except one, who was a Hungarian.

All the shares in the Vulcan Coal Company were held between the Vulcan Transport Company, the Rhine Company, and the Lohberg Company. These last two named companies were also registered in Germany, and all their directors and shareholders were Germans. It is seen, therefore, that no one other than enemy subjects was a director, manager, or shareholder in any of the companies which are supposed to have had an interest direct or indirect in the Hamborn Steamship Company or the *Hamborn;* and no person other than a German (unless it be the one Hun-

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garian) had any pecuniary or beneficial interest to the extent of even a pfennig in the shipping company or the ship. What was the object of registering the three companies, nominally Dutch, in Holland I do not know. It is possible that there are similar provisions in the law of Holland with reference to the ownership of a Dutch vessel by foreign companies to those contained in our merchant shipping Acts. But no information was given to the Court as to this.

These being the facts, was the *Hamborn* in reality a Dutch or a German vessel? In my view there can be no doubt about the answer. She was a German vessel belonging to German owners.

In the course of the argument minute criticism was made of the translation of art. 6 of the constitution of the Vulcan Transport Company, which dealt with the respective positions and powers of Groninger and Nalenz on the one hand and the five German directors of the managing company on the other. It was argued that Groninger and Nalenz were in the position of directors, and that the five German directors were a supervisory committee, and not the directing body.

If it be necessary to deal with the question as one of substance and not of words only, I am of opinion that the result of the evidence shows that the correct translation of art. 6 is as follows: "The management of the company is entrusted to a committee consisting of at most seven managers (first fixed, as seen below, at two, namely, Groninger and Nalenz), who are appointed and dismissed by the general meeting of shareholders. The committee of management is under the supervision of the board of directors. In the absence of one or more of the directors, the members of the board of directors shall decide whether the vacancies are to be filled. In derogation of the foregoing as regards the manner of appointment, there are appointed for the first time, as the managing committee, Messrs. Hans Groninger and Carl Nalenz, both of Rotterdam."

Art. 10 similarly should read: "The committee of management require the assent of the members of the board of directors" for the purposes therein set out.

So art. 11: "The members of the board of directors determine the conditions under which the committee of management are appointed and fix their salaries, without prejudice to the power

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of the general meeting to dismiss at any time one or more of the committee."

And, lastly, art. 16: "The members of the board of directors determine the general rules according to which the business of the company is to be carried on. In all current measures they serve the committee of management as an advisory council. The committee of management are always obliged to carry out the directions of the board of directors."

The above gives the effect of the clauses in language which is easily understood here. The difference in the names of the two bodies is not worth discussion. It is no greater than "the difference 'twixt tweedledum and tweedledee." The result is that Groninger and Nalenz, the two Germans at Rotterdam, were entirely under the control of the five German directors in Germany, and that the centre and whole effective control of the business of the Hamborn Steamship Company was in Germany.

Having regard to these facts, the vessel must be regarded in this Court as belonging to German subjects.

I perhaps ought to mention one other consideration which was placed before the Court by counsel for the claimants by reference to art. 57 of the Declaration of London, whereby it had been provided that the neutral or enemy character of a vessel was determined by the flag which she was entitled to fly.

Whether, if all the circumstances were known, it would be held in the Courts of Holland that the vessel was "entitled" to fly the Dutch flag I do not know.

But in any event, by an Order in Council of October 20, 1915, it was declared that the said art. 57 should from and after that date cease to be adopted and put in force, and that in lieu of the article the Prize Courts should apply the rules and principles formerly observed in them. The vessel was not captured till October 27, 1915.

It was said that the Order in Council was only published in the *Gazette* on October 26, and that the vessel had no opportunity of changing her flag. Whether it was desired to change it, and how long it would have taken, I do not know. The date of the publication of the Order in Council, whatever it was, is, is my view, immaterial. The article was not, in fact, in force at the date of capture,

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and a ship which was really an enemy vessel had no protection under it; and that is enough. But in truth no serious argument was pressed upon the Court on this head. The facts were stated rather in support of a plea ad misericordiam. The vessel being enemy property, such a plea, emanating from such an enemy, lacks not only force or favour, but is devoid even of a sense of decency.

The decision of the Court is that the *Hamborn* is condemned as good and lawful prize.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *Pritchard & Sons.*

E. C. T.

1918
Jan. 14, 15.

[ADMIRALTY.]

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[1917, fol. 417.]

Admiralty—Collision—Narrow Channel—Vessel starboarding to proceed up Channel—Starboard Helm Signal—Down-coming Vessel not thereby invited to pass Starboard to Starboard—Regulations for Preventing Collisions at Sea, arts. 19, 25, *and* 28.

The plaintiffs' steamship *Rose*, coming down North Lowestoft Roads from north to south, sighted the defendants' steamship *Ravenna*, heading to the eastward distant about two miles, and bearing fine on the starboard bow. The *Ravenna*, which was engaged in heaving up her anchor, continued to get under way, put her engines ahead and starboarded her helm to come round to the northward, and twice sounded the starboard helm signal of two short blasts. The *Rose* took these signals as an invitation to pass starboard to starboard, and accordingly replied with two short blasts and starboarded her helm. The two vessels came into collision:—

Held, that the Roads must be regarded as a narrow channel; that the *Rose* should have kept to the side of the channel which lay on her starboard hand; that she was not justified in assuming that the *Ravenna's* starboard helm signals were an invitation to her to pass starboard to starboard; and that the *Rose* was alone to blame.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Rose;* the defendants and counter-claimants were the owners of the steamship *Ravenna.*

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The collision took place in North Lowestoft Roads about 4.45 A.M. on May 19, 1917. The weather was fine, there was a light south-easterly wind, and the tide was the first of the flood, of little force. The *Rose*, a screw steamship of 872 tons gross, was on a voyage from Goole to London with a cargo of coal. The *Ravenna*, a screw steamship of 1169 tons gross, was on a voyage from Nantes to West Hartlepool with a cargo of ore.

The plaintiffs' case was that the *Rose*, which had been at anchor in Corton Roads, had got under way and was steering a course of S. magnetic, making a speed of about four knots, when the *Ravenna*, which had first been observed at anchor about two miles below the *Rose*, was observed to be getting up her anchor. She was then lying athwart the tide with her head about E.N.E. The engines of the *Rose* were put to dead slow and she continued on her course. Shortly afterwards the *Ravenna*, which was then distant less than a quarter of a mile and bore three to four points on the starboard bow of the *Rose*, sounded two short blasts on her whistle. The whistle of the *Rose* was sounded two short blasts in reply, her engines were stopped, and her helm was starboarded as much as was prudent having regard to a mine-sweeper which was at anchor on her port bow, and then was steadied. Shortly afterwards the *Ravenna* again sounded two short blasts, to which the *Rose* replied with two short blasts, and very soon afterwards, as the *Ravenna* instead of acting in accordance with her whistle signals was seen to be coming ahead causing risk of collision, the engines of the *Rose* were put full speed astern and her whistle was sounded three short blasts. Notwithstanding these measures the *Ravenna* came on with increased speed and with her stem struck the starboard bow of the *Rose* just abaft the stem.

The plaintiffs alleged, inter alia, that the *Ravenna* neglected to wait until the *Rose* had passed clear before coming ahead across the channel; that after sounding starboard helm signals she failed to act in accordance with them or to do so effectively; and that she failed to comply with arts. 27, 28, and 29 of the Regulations for Preventing Collisions at Sea.

According to the defence, the *Ravenna* was heaving up her anchor and heading about E. by N. magnetic, when those on board her observed three steamships coming down the Roads from

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the northward, of which the *Rose* was the most distant, being about one and a half miles away and bearing about abeam on the port side with her starboard bow open. The *Ravenna* kept on heaving in her cable and slowly swinging round with the tide. When the anchor was hove up, at which time the *Ravenna* was heading about E.N.E. and the *Rose* was a long distance off and bearing a little before the port beam of the *Ravenna*, the engines of the *Ravenna* were put slow ahead and her helm was starboarded to get on to her course to the northward. Two short blasts were sounded on her whistle, and shortly afterwards the engines were put half speed ahead and soon afterwards full speed ahead. When the *Rose* had drawn nearer and was bearing broad on the port bow of the *Ravenna* with her starboard bow open, the whistle of the *Ravenna* was again sounded two short blasts and her helm was kept to starboard. The *Rose* sounded two short blasts in reply, apparently indicating that she intended to pass ahead of the *Ravenna* and between her and a vessel at anchor, instead of passing the *Ravenna* port side to port side, as she could have done. The engines of the *Ravenna* were immediately put full speed astern, and three short blasts were sounded on her whistle following on a similar signal from the *Rose*, and the helm of the *Ravenna* was put amidships, but shortly afterwards the two vessels came into collision.

The defendants alleged, inter alia, that the *Rose* improperly failed to keep to that side of the channel which lay on her starboard side; improperly starboarded; improperly failed to pass the *Ravenna* port side to port side; and failed to comply with arts. 23, 25, 27, and 29 of the Regulations for Preventing Collisions at Sea.

Jan. 14. *Bateson*, *K.C.*, and *D. Stephens*, for the plaintiffs. The crossing rule (art. 19) applies, and the *Ravenna* should have kept her course and speed; whereas she went ahead, altered her course, and sounded a signal intimating that she was directing her course to port. That signal she repeated, and the *Rose* was justified in assuming that it was a signal that the vessels should pass starboard to starboard. Under art. 28 the *Ravenna* had no right to sound the starboard helm signal unless she was taking a course "authorized or required by the rules." It was a misleading signal, as she did not in fact continue to round under starboard helm and pass the

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Rose starboard to starboard. But for the signal the *Rose* would have ported and gone under the *Ravenna's* stern.

Balloch and *Dumas*, for the defendants. The North Lowestoft Roads must be regarded as a narrow channel, and both vessels ought to have kept to that side of the channel which lay on their own starboard hand (art. 25). The *Ravenna*, from her position at anchor, put her engines ahead and starboarded her helm to go up the channel, keeping to the starboard side of it. The starboard helm signals merely indicated that she was directing her course to port under starboard helm in the ordinary course of navigation to get on to a northerly heading to the eastward of the channel. The signal is not an indication to a vessel approaching on the port hand to pass starboard to starboard, and the *Rose* was not justified in assuming that it was. It was her duty in a narrow channel to continue on down the west side and to pass under the *Ravenna's* stern.

HILL J. The collision in this case happened early in the morning on May 19, 1917, in North Lowestoft Roads, below the Holm End Buoy and above the West Holm Buoy. The *Rose*, a steamer of 872 tons gross and 200 feet in length, was laden, and she was passing down the Roads from north to south, at a speed of about four to five knots. The *Ravenna*, a steamship of 1169 tons gross and 248 feet in length, was also laden. She had been at anchor, and had just got under way, in order to proceed to the northward. The wind was S.E. light, the weather fine, and the tide the first of the flood, of little force. The ships came into collision, the stem of the *Ravenna* and the starboard bow of the *Rose* close to the stem—between the stem and No. 1 frame. The *Rose* was cut down for her whole depth. The *Ravenna's* damage was not so serious; it is to be observed, however, that the damage was on both bows, but more on the port bow.

There is little dispute in fact. The questions in the case as regards both ships are, whether they acted according to the regulations and with a seamanlike care. The Roads were, as I find, considerably congested with vessels at anchor, and the really navigable channel was much restricted, especially on the western side. The *Ravenna* had been at anchor three to four cables south-west of the Holm End

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Buoy, but had got under way, the first movement of the engines being some five minutes before the collision. By the time of the collision she had made some, but not very much, way to the eastward, and, as I find, also to the northward. The collision was some two to three cables south-west of the Holm End Buoy—that is to say, somewhat to the eastward of the mid line of the restricted channel. The *Rose* had sighted the *Ravenna* first, before the *Ravenna* began to move and while she was getting up her anchor, and so sighted her fine on the starboard bow, some two miles away. The collision came about by the fact that the *Ravenna* was crossing the restricted channel while beginning to get her head round to the northward, and by the fact that the *Rose* starboarded.

The questions I have to consider are, I think, these: First, was the *Ravenna* justified in getting under way, having regard to the fact that the *Rose* and another steamer ahead of her and a little on her starboard bow were proceeding down the Roads, or ought the *Ravenna* to have waited to let them pass, and, if she ought to have waited, was that fault a cause contributing to the collision; secondly, was the *Rose* justified in starboarding as she did; and, thirdly, ought either to have reversed sooner than she did?

I will say at once that in my opinion the crossing rule did not apply to these ships. I do not think that the *Ravenna*, by getting under way as she did, could put the *Rose* into the position of the give-way ship under the rule. That is not to say that, in the circumstances of these ships, if there were nothing else in the case, it would not be the seamanlike thing for the *Rose* to pass the *Ravenna* astern, as I think the master of the *Rose* recognized. I think, however, that the Roads at this point are to be regarded as a narrow channel, and that the proper course for ships passing north and south is to keep to that side of the water which lies on their starboard hand.

Now, coming to the first question, ought the *Ravenna* to have moved? That depends on the distance at which the *Rose* was when the *Ravenna* got under way. The *Ravenna* was entitled to get under way, but she must do so with due regard to passing traffic. The master of the *Ravenna* says he began to work his engines ahead when the *Rose* was a mile away. The master of the *Rose* says the *Ravenna* only began to come ahead when 600 to 800 feet away.

It would take the *Ravenna* an appreciable time to gather any noticeable way; and as the *Rose* put her engines at dead slow, then at stop, and then at full speed astern, in the five minutes during which the *Ravenna* was moving her engines, I am satisfied that the distance was not anything like one mile, though it was more than the *Rose* says. It was, however, so short a distance that it was an imprudent thing for the *Ravenna* to do. But did that cause, or contribute to, the collision? Notwithstanding the fact that the *Ravenna* got under way, the *Rose* had time to starboard, and did alter one point under starboard helm. If so, the *Rose* had time to port, and if the *Rose* had ported (assuming she could have ported), or even if she had not altered helm at all, there would have been no collision.

Therefore it seems to me that the real question in the case comes to this: Was the *Rose* justified in starboarding? She says she was because the *Ravenna* sounded a starboard helm signal. But here the *Rose* seems to me to have made a mistake, which I think is too commonly made, and which ought not to be made. The signal meant, "I, the *Ravenna*, am starboarding and directing my course to port." The *Rose* took it as an invitation to pass starboard to starboard. There was no justification for that assumption. The *Ravenna*, getting under way from an easterly heading, would naturally starboard if she wanted to proceed to the northward, and would naturally get gradually on to the east side of the Roads under starboard helm. The *Rose* had no right to conclude that she was going to do anything else, especially as the two ships were in a narrow channel, and each was under a duty to get on to her own starboard side. The *Rose* should have kept to her own side. She chose to starboard on to her wrong side. She was not, in my opinion, misled into that by the signal from the *Ravenna*. She chose to mislead herself by giving to the signal a meaning it does not bear. It is said, however, that she could not port—that there was no room to port—there being other ships in the way. But the other ship, which was passing down ahead and a little on the starboard bow of the *Rose*, did in fact pass under the *Ravenna's* stern, and the *Rose* could have done the same, or she could have waited and fallen into line directly astern of the other ship and so passed the *Ravenna*.

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The master of the *Rose* acted with caution in everything else, but he made a fatal mistake, and one which I am bound to regard as negligence, in treating the starboard helm signal of the *Ravenna* as an invitation to himself to starboard. He did starboard, and thereby threw himself across the *Ravenna's* course instead of keeping to his own side of the channel. This being so, it really does not matter much whether the *Ravenna* in fact altered under her starboard helm or not. There is a dispute as to whether she did. I think she must have altered somewhat, and that the blow was not absolutely a right-angle blow. I have no doubt at all that, inasmuch as she was heading to the eastward and wanted to get to the northward, when she put her engines ahead she also starboarded, and as she gathered way the starboarding must have had some effect.

That leaves the question whether the *Ravenna*, as a matter of seamanship, ought to have reversed sooner. She continued on gathering way while she knew that the *Rose* was starboarding, and she did not reverse till the very last and after the *Rose* had reversed. The result was that the *Rose* at the time of the collision had no forward way, and the *Ravenna* had some substantial forward way. I do not, however, accept the view that in five minutes she could have got up to anything like the speed that was attributed to her; she was a laden ship and the momentum of only a small way would do the damage.

I have asked the Elder Brethren whether in their opinion, as a matter of seamanship, she ought to have reversed sooner, and they advise me that, in the circumstances, she ought not. I agree. The *Ravenna*, by the starboarding of the *Rose*, was put in a position in which she could really do nothing. She had the other steamer passing astern of her and the *Rose* shaping to pass ahead of her. In the circumstances, I cannot find her in fault for not reversing sooner. The cause—the only cause—of the collision was in my opinion the mistake of the *Rose* in starboarding, and therefore the *Rose* is alone to blame.

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants: *Thomas Cooper & Co.*

E. C. T.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

C. A. 1917 *Nov.* 12.

[IN THE COURT OF APPEAL.]

BERESFORD *v.* ATTORNEY-GENERAL (MARQUIS OF WATERFORD AND OTHERS CITED).

Practice—Evidence—Action to perpetuate Testimony—Depositions—Publication—Conditions under which ordered—Subsequent Legitimacy Suit—Inability of Witnesses to attend Trial—Admissibility of Depositions in Evidence—Dispensing with Attendance of Witnesses.

An order for the publication of depositions taken in an action to perpetuate testimony should not be made unless it is proved to the satisfaction of the Court that the witnesses are either dead or so ill or otherwise incapacitated as to be unable to attend and give evidence in open Court at the trial of the issue in the subsequent action with reference to which their evidence is desired.

Morrison v. *Arnold* (1817) 19 Ves. 670, 674, and *Biddulph* v. *Lord Camoys* (1855) 20 Beav. 402, 404, followed.

Where depositions had been taken in an action to perpetuate testimony and subsequently published, and it was proved to the satisfaction of the Court of Appeal that the witnesses, although alive, were incapacitated by age and infirmity from attending the trial of a legitimacy suit in contemplation of which the depositions were taken, the Court reversed an order of the Probate Division directing the evidence of the witnesses to be taken over again before an examiner, and ordered that the depositions (saving all just exceptions) should be admitted at the trial without further evidence, and that the attendance of the witnesses should be dispensed with.

APPEAL from orders of Horridge J. in chambers.

In this case a petition was presented by George Beresford (otherwise known as George Tooth) under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), seeking to establish that he was the eldest son of the fifth Marquis of Waterford by his wife Florence Grosvenor, Marchioness of Waterford, and therefore the sixth Marquis of Waterford.

The parties cited were the seventh Marquis of Waterford and the trustees of the Waterford family estates.

On October 29, 1917, the parties cited applied by summons in chambers to Horridge J., sitting as a judge of the Probate Division,

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for an order that they might be at liberty to read and use the depositions of two witnesses taken in an action to perpetuate testimony in the Chancery Division, and that the attendance of those witnesses at the trial might be dispensed with. Horridge J. dismissed the application, and, being of opinion that the two witnesses would be unable to attend the trial, and the petitioner not requiring that separate summonses should as a matter of form be taken out, made two separate orders that the two witnesses should be examined, cross-examined, and re-examined before an examiner, and that their depositions should be admitted at the trial without any further evidence.

The following statement of facts is taken from the judgment of Swinfen Eady L.J. :—

The petitioner claims to be the sixth Marquis of Waterford and the eldest son of the fifth Marquis. He alleges that he was born at the end of March, 1873, and that he was the lawful issue of Florence Grosvenor, the then Marchioness of Waterford. The fifth Marquis died on October 25, 1895, and the petitioner, if born, as he alleges, in 1873, would in 1895 be between twenty-two and twenty-three years of age. Although alleging himself to be the sixth Marquis, no proceedings were taken by him to establish his title to the position or the estates. The sixth Marquis died in 1911, leaving one of the parties cited now an infant, the seventh Marquis.

The parties cited wholly dispute the petitioner's allegation that he is the son of the fifth Marquis as he alleges, and say that he is the son of one Georgina Tooth, who was the sister of the cook to the Marchioness of Waterford, that he was born in the year 1872, that his name is George or John Tooth, and that he was brought up as and is now a gardener.

The petitioner not having taken any proceedings to establish his claim, between the year 1895, when the fifth Marquis died, and the year 1913, and the sixth Marquis being dead, and the seventh Marquis being then an infant, proceedings were taken to perpetuate testimony lest the petitioner might wait before bringing forward his claim until the witnesses who were able to speak to the facts might all be dead. In the year 1913, therefore, the petitioner having for years threatened his claim, and for twelve

or thirteen years having made allegations that he was the Marquis, but not having taken any legal steps to establish his title, the parties opposing him in their turn took proceedings to perpetuate the testimony of living persons so that their evidence might not be lost by their death. The material witnesses were then becoming advanced in years; their evidence was admittedly most material, and would be in danger of being lost unless taken. In that action the evidence of the two witnesses with which we are dealing was taken. There was also the evidence of a third witness taken, but as his name has not been mentioned on this appeal I will say nothing about him. There were two ladies examined, Mrs. White and Mrs. Vivian, formerly Mrs. Price. Mrs. White's evidence is of the utmost importance, as according to it she was present when the Marchioness of Waterford was confined, and she states that the child died, was buried, and is therefore not the petitioner, and she gives details with regard to it. The evidence of Mrs. Vivian, formerly Mrs. Price, is also material. Mrs. White was examined and cross-examined at considerable length, and her evidence took three days to give, namely, July 23, 24, and 25, 1913. Mrs. Vivian's evidence appears to have taken one day. The petitioner was represented at the taking of that evidence. Complaint was made by his solicitor to the solicitors for the parties cited that his funds were low, and in order that he should not be unable to avail himself of the services of counsel they actually paid the costs of his solicitor and counsel that he might attend and cross-examine their own witnesses. They gave him every opportunity of having his case, so far as it could be put to these witnesses, brought out. His solicitor's costs of this hearing were taxed and paid. The evidence having been taken, the depositions were filed. It seems that after that the petitioner, feeling very much aggrieved with the evidence, commenced a series of libellous attacks on Mrs. White. [His Lordship referred to the nature of these attacks and the subsequent prosecution of the petitioner, and continued:] The result of those attacks upon Mrs. White's health has been such that, according to the medical evidence, she is not in a condition to attend the trial. We have then the full evidence from her doctor who attended her frequently, and it is manifest that her state of health is such that she is unable to be

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present at the trial and to give evidence either before a judge or a judge and jury, if there should be a jury. Horridge J. has acted upon that view. The order he made is only justifiable upon the ground that the witness is unable to attend. Her evidence is not to be taken de bene esse, but to be taken over again with a view to the trial. Mrs. White is upwards of seventy-one, and the other old lady, Mrs. Vivian, is now verging on eighty, or at all events upwards of seventy-eight years of age. There is strong evidence with regard to her that she would be unable to stand the fatigue of a journey to London and give evidence at the trial. The only evidence against this is that of local persons at Lyme Regis who have seen the lady walking about and going in and out of shops. No one suggests that she is laid up on a bed of sickness. The evidence is that owing to her advanced age she is unable to travel. The learned judge accepted that view. In my judgment the evidence establishes that Mrs. White and Mrs. Vivian are not in such a state of health that they will be able to attend at this trial, which is expected shortly to take place. I am told that it will not take place until after Christmas, but the case stands in the printed list. An application was made before Eve J. (1) that he would direct publication of the depositions taken in the Chancery proceedings to perpetuate testimony. The learned judge made an order on July 6, 1917, in which he ordered that the depositions of the witnesses examined on behalf of the plaintiffs in the action be published forthwith, but without prejudice to any question as to their admissibility in evidence at the hearing of the suit or cause now proceeding. The order goes on: "The plaintiffs and defendants are to be at liberty to inspect and take certified copies of such depositions and also to have access to the various documents filed with the said depositions for the purpose of taking photographs and other facsimile copies thereof or portions thereof."

The parties cited appealed from the order of Horridge J. dismissing their summons and asked that the depositions of Mrs. White and Mrs. Vivian taken in *Anson* v. *Tooth* (1), the action to perpetuate testimony in the Chancery Division, might be read and used on the trial of the present petition and that the attendance of these witnesses should be dispensed with.

(1) See *Anson* v. *Tooth* [1917] W. N. 234.

There was a cross-appeal by the petitioner against the orders directing the evidence of these witnesses to be taken on commission and asking to have it taken in Court.

Hume Williams, K.C., *Ashworth James*, and *R. F. Bayford*, for the appellants. The depositions taken in the Chancery action to perpetuate testimony ought to be allowed to be used at the trial of this petition. It is true that the deponents are not dead, but they are by reason of age and ill-health unable to attend to be examined at the trial. In such a case an order allowing their depositions to be used ought to be made: Taylor on Evidence, 5th ed., vol. 1, s. 545, p. 387. As their evidence has been already taken on commission, there can be no reason for taking it over again before an examiner. Further, the depositions having now been published, and the petitioner having had the opportunity of seeing them, it is not right that another opportunity should be given him of cross-examining the deponents.

[WARRINGTON L.J. referred to *Biddulph* v. *Lord Camoys*. (1)

SCRUTTON L.J. referred to *Watkins* v. *Atchison*. (2)]

Divorce and matrimonial causes are excepted from the Rules of the Supreme Court, Order LXVIII., r. 1, and there is no rule with regard to matrimonial causes corresponding with Order XXXVII., r. 18, of the Rules of the Supreme Court. Horridge J. felt this difficulty, and as he was unable to hold that the witnesses could not attend somewhere though not in Court to give evidence, he reluctantly made the order for them to be examined over again. It is submitted that where evidence has been taken in an action to perpetuate testimony and the Court is satisfied that the witnesses are incapacitated by age or infirmity from attending to be examined at the trial of the action which was in contemplation when the evidence was taken, the Court ought to refuse to order the evidence to be taken over again and should direct that the evidence already taken be read and used at the trial and the attendance of the witnesses dispensed with.

[WARRINGTON L.J. referred to *Lady Llanover* v. *Homfray*. (3)]

If the depositions in the present case were ordinary deposi-

(1) 20 Beav. 402.

(2) (1853) 10 Hare, App. xlvi.

(3) (1879) 13 Ch. D. 380; (1881) 19 Ch. D. 224.

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tions taken de bene esse, the Court could direct them to be received in evidence upon proof that the witnesses were unable to travel.

Colam, K.C., and *Alexander Cairns*, for the respondent. The first question is whether the order made by Eve J. is conclusive as to the admissibility of the depositions. On the application before him leave to publish only was granted and the part of the notice of motion referring to the use of the depositions in evidence was struck out. The question, therefore, as to their admissibility was not decided by Eve J. In making the order the learned judge carefully reserved the right of the judge at the trial to decide how far the depositions were admissible in evidence. The common form of the order for publication of depositions is that the parties shall be entitled to use the evidence "as by law they can." It is submitted that the law is that depositions taken in one suit cannot be used in another suit when the witnesses are alive and can be examined in the suit in which it is sought to use them, the reason being that it is necessary at a trial that the best evidence should be obtained. It is only when the Court is satisfied that the witnesses cannot attend to be examined that the Court will allow their depositions to be used. In the present case it is submitted there is no sufficient evidence to enable the judge to dispense with the attendance of the witnesses. The petitioner desires to cross-examine Mrs. White on a number of points in the light of information which has recently come to his knowledge as the result of inquiries made.

Unless there is conclusive evidence that the witnesses cannot attend the trial or be examined on commission, the Court will not allow the petitioner to be deprived of his right of cross-examination and so lose an enormous advantage. There is no case in which it has been held that the fact of publication of a deposition exempts the deponent from further examination. In the head-note to the report of *Barnsdale* v. *Lowe* (1) it is stated that the Court will not make an order for the publication of depositions in a suit to perpetuate testimony while the witnesses are alive. That proposition is no doubt too widely stated. In the circumstances of this case it is submitted that the petitioner is entitled to the best evidence,

(1) (1831) 2 Russ. & My. 142.

e.g. viva voce evidence, at the trial, or to have the evidence taken on commission.

[SWINFEN EADY L.J. In *Biddulph* v. *Lord Camoys* (1) it was pointed out that the parties might have the benefit of the evidence given in a suit to perpetuate testimony when the witness, though alive, was prevented from attending to give evidence viva voce in open Court.]

In that case there was no order, as here, that the applicants could use the depositions "as by law they can." The judge was there dealing only with the question of the publication of the evidence. To entitle an applicant to use depositions in a subsequent action the issues in the two actions must be the same. Here they are not. There is an additional issue raised in the legitimacy suit whether the petitioner is the son of the sister of the cook to the late Marchioness.

Pilcher, for the Attorney-General.

Hume Williams, K.C., was not called upon to reply.

SWINFEN EADY L.J. These are in form three appeals from three orders. One is an application by the parties cited asking this Court to reverse an order made by Horridge J. dismissing the applicants' summons. They ask that an order should be made in accordance with their summons, which is for an order to read certain depositions taken in a suit to perpetuate testimony. On that summons coming before Horridge J. he not only dismissed it, but, the parties agreeing that it was not necessary to take out separate summonses as a matter of form, made two separate orders that the two material witnesses should be again examined, cross-examined, and re-examined before an examiner on the footing that those two witnesses would be unable to attend the trial, and that their depositions should be admitted at the trial of the issue without any further evidence. Those two orders were not in form that the witnesses' evidence was to be taken de bene esse in case they should be unable to appear at the trial, but were orders that their evidence should be taken and that their depositions should be read without those witnesses having to attend the trial. The parties cited appeal from the dismissal of their summons and they

(1) 20 Beav. 402.

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ask that this Court should make the order which they contend the learned judge in the Court below should have made, that the depositions taken in the suit to perpetuate testimony should be read. On the other hand the petitioner in these proceedings, appealing from the two orders to further examine the two witnesses, asks that the order may be discharged so that the two witnesses may have to attend in open Court on the trial of the issue to obtain the declaration which he asks. The facts leading up to this dispute may be very shortly stated. [His Lordship stated the facts as above set out, and after referring to the order of Eve J. of July 6, 1917, continued :] With regard to this order, I wish to observe that it is the settled practice of the Chancery Division that no order shall be made for the publication of depositions taken in a suit to perpetuate testimony unless it is proved to the satisfaction of the Court that the witnesses are either dead or so ill or otherwise incapacitated as to be unable to travel to attend at the hearing and give their evidence in open Court on the trial of the issue with reference to which their evidence is desired. Lord Eldon treated this as settled practice in his time, and it has remained so ever since. In *Morrison* v. *Arnold* (1) he said : " After considerable research, there is not a single instance except of a person sick, incapable of travelling or prevented by accident : all the orders, but in those excepted cases, stating, that the witness is dead." Sir John Romilly M.R. expressed the same view in *Biddulph* v. *Lord Camoys*. (2) He said : " I am of opinion that the plaintiff is entitled to the order "—in that case the publication he was asking for—" and that the case comes within the rule of authorities cited. You cannot have the benefit of the evidence given in a suit to perpetuate testimony, if you can get the witness examined viva voce ; "—that means not examined viva voce again before an examiner, but examined viva voce at the hearing of the main suit or action or declaration, or whatever the proceedings are—" but if a witness cannot travel without danger to his health, he cannot give his evidence in open Court ; he is prevented from attending,"—as both these witnesses are. In a subsequent case of *Barnsdale* v. *Lowe* (3), to which Mr. Colam

(1) 19 Ves. 670, 674. (2) 20 Beav. 402, 404.
(3) 2 Russ. & My. 142.

referred, the witnesses were living and an intending purchaser of the property desired to know what was in the evidence; the parties were willing to assist him by consenting to publication, but the learned judge refused to allow publication. In my opinion the rule is well established, and it is only in those excepted cases that publication should ever be made, and the learned judge should be satisfied before making an order for publication that the witness is either dead or prevented from attending in the circumstances I have mentioned.

That being so, I pass away from Eve J.'s order, because it is not material to further consider it at present inasmuch as the depositions have now been published. I approach, as an entirely separate question which would be the same whether they had been published or not, the question whether leave should be given to use the depositions at the trial of this petition. Of course, if leave is given, they would be published. In my opinion the parties cited have made out affirmatively that the two witnesses in question will be unable, owing to their age and infirmities, to attend the trial. That being so, we ought now to make the order which the learned judge below should have made, namely, an order as asked for by the summons, which is that the depositions may be read and used and the attendance of the witnesses dispensed with; but of course the evidence will be admitted saving all just exceptions. One does not know what exceptions may arise with reference to any particular question or answer. Subject to that, I am of opinion that the learned judge below should have made the order that the depositions should now be admitted as evidence. It is suggested that the petitioner would like the evidence taken over again, because he has now two documents in his possession which he says he had not before, upon which he would like to cross-examine the witnesses. One is a statutory declaration made by Mrs. White, and the other is a letter written by her when she was Miss Kynaston. When both those documents were referred to—and we have seen them both—Mr. Colam made no point upon them. He could not, or did not in fact, point out anything with regard to them or any matter in respect of which any special order ought to be made for any further cross-examination, or anything of that kind. For these reasons I am of opinion that the fact that the petitioner has now

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those two documents, one of which he had or might have had apparently long ago, makes no difference whatever to the decision as to whether the evidence of these two witnesses ought now to be admitted.

We ought to discharge the order made on the appellants' summons, and to make the order as asked for by it and to discharge the two orders to take the evidence over again before an examiner.

WARRINGTON L.J. I am of the same opinion. The present petitioner claims to be the only surviving lawful son of the fifth Marquis of Waterford and as such entitled to the title and honour of the fifth Marquis and to the family estates. In a suit instituted in 1913 to perpetuate testimony relating to that issue, to which the present petitioner was a defendant, two witnesses were examined and cross-examined, and their depositions, when completed, were, as is usual in such suits, deposited in Court and sealed up. Those two witnesses, whose evidence is admitted to be of great importance to the determination of the particular issue, are both still alive, but I am satisfied, as was the learned judge in the Court below, that they are not now, and are not likely at a future date to be, able personally to attend the trial. The respondents to the petition desire under those circumstances to use the depositions in the suit to perpetuate testimony at the hearing of the present petition, and they applied to the learned judge for leave accordingly. This the learned judge refused, but he at the same time, being satisfied, as I have already said, of the inability of the witnesses to attend, made an order for their examination upon commission. It will be observed that I have said nothing so far about the order of Eve J. directing publication of the depositions. I have done so deliberately. In my judgment, on the facts which I have so far stated, Horridge J. was wrong in the order, treating the three orders as one order, which he made. Being satisfied that the witnesses were unable to attend, and having had their evidence taken in the presence of the present petitioner and after cross-examination by the present petitioner in the suit to perpetuate testimony, I am of opinion that he ought to have allowed those depositions to be read and not to have required the examination of these witnesses over again,

not in Court, but before an examiner. I agree, therefore, with the order that has been proposed by Swinfen Eady L.J.

I wish to say a word or two about the matter, the consideration of which I have hitherto omitted, namely, the application before Eve J. for leave to publish the depositions in the suit to perpetuate testimony, and the way in which he dealt with that application. According to the old practice of the Court of Chancery, an order for the publication of evidence in a suit to perpetuate testimony was never made except in circumstances which would justify the use of that evidence in what we find referred to as the second action—that is to say, the action which is apprehended at the time the suit to perpetuate testimony is started and with reference to which it is required to perpetuate the testimony. In the case of *Morrison* v. *Arnold* (1) Lord Eldon was at first inclined to think publication was never ordered unless the witnesses were dead, but he was persuaded, or he persuaded himself, to relax that strict rule and to order the depositions to be published under the other set of circumstances under which they could be used in what may be called the second suit—that is to say, the witness being unable by illness, accident, old age, or otherwise, to attend the proceedings in open Court. Those were the two grounds upon which the order to publish testimony used to be made. In my opinion, with all respect to Eve J., he ought not to have made the order he made in the present case without considering and without determining upon the evidence before him whether or not these witnesses were able to attend the trial in open Court.

Scrutton L.J. As we are differing from the learned judge in the Court below, and this is a matter of some general importance outside this particular case, in agreeing with my learned brothers I desire to express my reasons in my own words.

The petitioner brings his suit for a declaration of legitimacy and alleges that he is the eldest legitimate son of the fifth Marquis of Waterford. The parties cited, members of the family and the trustees, deny that he is the eldest son, and go further and propose to prove that he is in fact the son of the sister of the cook to the Marchioness of Waterford. For some twenty years the petitioner,

(1) 19 Ves. 670.

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as he says through lack of means, did not put forward his claim in any legal proceedings, and there was the danger that the witnesses who could state what happened at the time of the alleged birth might be dead whilst the petitioner survived, and accordingly an action to perpetuate testimony was brought by those representing the Beresford family, in which two ladies, Mrs. White and Mrs. Vivian, were examined, the petitioner being represented and cross-examining them, in the case of one lady at considerable length for some three days. The petitioner has now brought this legitimacy suit, and the parties cited wish to make use of the testimony given by the two ladies, though the two ladies are not dead, alleging that they are unable through age and illness to give evidence in open Court. Horridge J., recognizing that they were unable to give evidence in open Court, has made an order, not that the previous depositions should be admitted, but that the evidence of the two ladies should be taken over again before an examiner. The parties cited appeal.

Proceedings to perpetuate testimony have always been brought in the Court of Chancery or the Chancery Division, and the record of the depositions when taken has been returned into the Chancery and kept sealed and secret. The first proceeding to make them evidence has been an application to the Court of Chancery to publish or allow publication of the sealed records deposited with the Court, and, so far as I can follow the authorities, it certainly has been the practice of the Court of Chancery not to take the seal of secrecy off these depositions, not to release the records, unless it is satisfied that the witness is dead or sick, incapable of travelling, or prevented by accident from appearing in open Court. The Court has recognized that that procedure has its disadvantages, as is quaintly said in one of the text-books : " The witnesses' knowledge of what they swear can only be published after their responsibility has ceased." The Court of Chancery had adhered to that rule. Eve J. in this case, whether intentionally or without referring back to the previous authorities, has not followed it, but has released the record without deciding whether or not the condition of the witnesses is such that they cannot give evidence in open Court. As far as I can follow the authorities that proceeding is not in accordance with the previous practice of the Court of Chancery.

A further question of some difficulty arises as to what is the effect of an order of the Chancery Division publishing the depositions or releasing them from its secret control. In two cases certainly the Court of Chancery, in making an order for publication of records in order that they might be used in the Court of King's Bench, assumed that they would be used as a consequence of its order. In *Watkins* v. *Atchison* (1) and in *Biddulph* v. *Lord Camoys* (2) Romilly M.R. seems certainly to have assumed that if he ordered the records to be published they would without any further procedure become evidence in the King's Bench. When one reflects that proceedings to perpetuate testimony are taken not only to provide testimony for English Courts, but also for foreign Courts, I am at present very doubtful whether the order for publication has that effect. I should wish to consider the matter carefully if it became necessary to decide the point in any future proceeding. The way in which this case strikes me is this: Here are certain records, and an application has been made, not to the Chancery Division, but to the Court that is going to hear the petition, to admit them in evidence. If the witness had died, I think the effect of the procedure to perpetuate testimony in a case where the issue was the same and the parties the same, would be to make the evidence admissible in the Court in which it was tendered. If the witness was not dead but able to attend the Court and give evidence in open Court, then it appears to me the rule that the best evidence must be given would shut out the depositions even if they had been published by the Chancery Division, because they would not be the best evidence in the action pending in the other Court. But supposing the position is that the witness, though not dead, is not able to attend and give evidence in open Court, then the rule that the best evidence must be given does not assist. There would be two sets of depositions, one the evidence taken before an examiner under the order suggested by Horridge J. and the other the evidence taken before an examiner in the proceedings to perpetuate testimony. Prima facie one is not better than the other, and there is no reason why you should take the second when you have the first. It appears to me—I do not know whether it is necessary finally to decide it—that it must

(1) 10 Hare, App. xlvi. (2) 20 Beav. 402.

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[Scrutton L.J.

always be open to the judge of the Court to see whether better evidence can be obtained by taking a second examination before an examiner. It may well be that fresh matters have come to light, that are brought to his attention, that convince him that more justice will be done by a second examination than by relying upon the first examination taken at a time when the facts were not known; but prima facie if no such evidence is given before him it appears to me that the judge should not go through the expensive form of ordering a second taking of evidence that has once been taken between the same parties in the same matter in the same way, but should accept the depositions under the practice for perpetuating testimony without requiring them to be taken over again before an examiner, as Horridge J. has done in this case. The petitioner puts forward affidavits giving as a reason why the evidence should be taken over again the fact that he has copies of two documents which he says would make a material difference. One of them is a letter which seems to me to hurt him rather than help him, but neither document seems to help him at all. I quite appreciate what Mr. Colam said, that if you have a witness who seems on the plaintiff's view not to be telling the truth, the worst thing to do is to tell the witness beforehand the facts that you are going to put to him or her and give the supposed lying witness an opportunity of making up a tale which he or she will give in answer to what is about to be put to him or her. But while you cannot be expected in a case like that to show your whole hand in requiring a witness to be examined again, you must show that you have some sort of hand. In this case the only hand the petitioner suggests he has on the affidavits appears to be perfectly irrelevant, and there is no ground for making the order for a separate commission.

For these reasons I come to the conclusion that Horridge J. was wrong in making this order that the evidence should be taken over again in the case when it has been taken before. It is not a question of reading depositions in open Court; it is a question between two sets of depositions. I therefore agree with the judgment stated by my learned brothers.

Solicitors: *Farrer & Co.; F. H. Adams; Treasury Solicitor.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1917
Dec. 17.

In re SHAW.

SMITH *v.* SHAW.

[1916 S. 372.]

Revenue—Income Tax—Deduction—Annuity—Charge on Property "by virtue of any deed or will or otherwise"—Compromise of Probate Action on agreed Terms—Defendant to be paid Annual Sum out of Estate—Terms made a Rule of Court—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 40.

An action in the Probate Division for proof of a will in solemn form was compromised at the hearing on terms signed by all the parties which provided: (1.) That the will should be proved; (2.) "defendant to be paid 300*l.* per annum during his life out of the estate as from date of death, payable half-yearly"; (3.) that the costs should be provided for; and (4.) "these terms to be filed and made a rule of Court." The President thereupon made a decree by which he found for the validity of the will and directed that the terms of compromise should be filed and made a rule of Court. On an application by the defendant for a declaration that the administratrix was not entitled to deduct income tax from the half-yearly payments of the annuity:—

Held, that the 300*l.* per annum was not a sum payable under an order of the Court, but was an annuity charged upon the estate by virtue of a contract and as such was chargeable to income tax under s. 102 of the Income Tax Act, 1842.

Held, therefore, that the administratrix was entitled under s. 40 of the Income Tax Act, 1853, to deduct and retain the income tax which became payable on the half-yearly payments.

Brooke v. *Price* [1917] A. C. 115 and *Blount* v. *Blount* [1916] 1 K. B. 230 distinguished.

Orders of the Divorce Division directing payment of alimony or permanent maintenance free of income tax are not within s. 103 of the Income Tax Act, 1842, and therefore the practice with regard to them has no application to cases where the payments are made in pursuance of contracts.

APPEAL from a decision of Horridge J.

Frances Emmeline Shaw, by her will dated December 22, 1910, devised and bequeathed the residue of her real and personal estate equally between her aunt Sarah Ann Smith and her four cousins

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Richard Bayley Smith, Norman B. Smith, Mabel Bainton, and Geraldine Ames, the children of her said aunt, and appointed R. B. Smith her executor.

The testatrix died on January 13, 1916.

The defendant, Townsend Wharton Shaw, the husband of the testatrix, who took no benefit under the will, entered a caveat against it, and thereupon R. B. Smith commenced the present action against him to establish the will in solemn form.

Before the action came on for trial R. B. Smith died and Mrs. S. A. Smith was substituted as plaintiff in his place.

In March, 1917, the action came on for trial before the President of the Probate Division, and was compromised on the following terms which were signed by the defendant and all the parties interested under the will :—

" 1. Will 22nd December, 1910, to be proved.

" 2. Defendant to be paid 300*l.* per annum during his life out of the estate as from date of death, payable half-yearly on 1st January and 1st July in each year. Payment for 13th January, 1916, up to 1st July, 1917, to be made on the latter date.

" 3. Costs of all parties to be paid out of the estate to be taxed by Mr. Registrar Barnard, certificate for special jury.

" 4. These terms to be filed and made a rule of Court."

These terms having been settled, the jury found for the will propounded by the plaintiff and judgment was given accordingly.

By his final decree dated March 28, 1917, the President pronounced for the validity of the will and directed that the terms should be filed and made a rule of Court.

Letters of administration with the will annexed were duly granted to the plaintiff, Mrs. S. A. Smith.

The estate of the deceased consisted mainly of chief rents and income from real and leasehold property, and in respect of the whole of the income of the estate tax was deducted at the source.

On August 8, 1917, the plaintiff's solicitors, in pursuance of the terms arrived at, sent to the defendant's solicitors a cheque for 335*l.* 18*s.*, being the proportion of the payment due under the terms from January 13, 1916, the date of the death, to July 1, 1917, less 102*l.* 19*s.* 8*d.* deducted for income tax. The defendant protested against the deduction of the income tax and contended that the 300*l.*

should be paid in full. The plaintiff declined to accede to this view, and accordingly on November 16, 1917, the defendant issued a summons to enforce the terms of compromise and for leave to issue execution against the plaintiff for the 102*l.* 19*s.* 8*d.*

On November 20 the summons came before the registrar, who dismissed it. The defendant appealed, and on December 3 the appeal was heard by Horridge J., who made an order allowing it and declaring that the plaintiff as administratrix was not entitled to deduct income tax.

The plaintiff appealed.

R. F. Bayford and *A. M. Latter*, for the appellant. It is submitted that the appellant was right in deducting the income tax. The 300*l.* a year is an annuity or annual payment and is a charge on the property of the person paying it, and, although not made a charge by deed or will, comes within the words "or otherwise" in s. 102 of the Income Tax Act, 1842. It is not a sum payable under an order of the Court. There is no personal judgment against any one. It is payable under the contract constituted by the terms of compromise, and that contract does not cease to be a contract because the terms are embodied in an order and made a rule of Court: *Conolan* v. *Leyland.* (1) The making of the terms a rule of Court is mere machinery to enable them to be enforced in a summary way without the necessity of bringing an action. The case is distinguishable from *Brooke* v. *Price* (2) and *Blount* v. *Blount* (3), as here there was no provision that the annuity should be free of income tax. Further, the practice of the Divorce Court with reference to orders for maintenance and permanent alimony has no application to a case where the payment is made in pursuance of a contract.

William Finlay, K.C., and *W. O. Willis*, for the respondent. The judge in the Court below was right in holding that income tax could not be deducted. The 300*l.* a year was ordered to be paid as the result of the compromise of the action. It is therefore payable under an order of the Court, and orders of the Court are not within either s. 102 or s. 103 of the Act of 1842.

(1) (1884) 27 Ch. D. 632, 638. (2) [1917] A. C. 115.
(3) [1916] 1 K. B. 230.

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[SWINFEN EADY L.J. Who is the judgment debtor ?]

The appellant as the person who has to pay the 300*l.* There is nothing in the Act of 1842 to prevent persons making such contract as they like as to the division of the net income of an estate among themselves : *Brooke* v. *Price.* (1)

[SWINFEN EADY L.J. The respondent might have stipulated for 300*l.* a year without deduction of income tax, but he did not do so.]

The words " deduction of income tax " would have been superfluous. Here there was an order of Court to pay 300*l.* a year. The terms of compromise were embodied in and became an order of Court. They are therefore in a different position than they would have been if they had still remained merely in contract. Sect. 102 of the Act of 1842 has therefore no application : *Brooke* v. *Price.* (2) Further, s. 40 of the Income Tax Act, 1853, does not apply to this case. There is here no person liable to the payment of the annuity as a charge on the property. An order like that in the present case is not such a charge as is contemplated by the section. If the Legislature had intended to bring orders within the section it would have so provided and would not have left them to be brought in under the words " or otherwise." It is submitted, therefore, that the order of Horridge J. was right and that there is no charge either within s. 102 of the Act of 1842 or s. 40 of the Act of 1853. [They also referred to *Frankfort* v. *Frankfort* (3) and *In re Barry's Trusts.* (4)]

No reply was called for.

SWINFEN EADY L.J. This is an appeal from an order of Horridge J. reversing an order of the registrar. The short question is whether the payment of an annuity of 300*l.* provided for by the terms of settlement of a probate action is to be paid free of income tax, or whether the person who has to pay it is entitled to deduct income tax. There was a probate action which was compromised on terms. [His Lordship read the terms of compromise, and continued :] The terms were signed by the parties to the action. Then there was a decree by which the will was pronounced for, and the jury found that the paper writing bearing date December 22, 1910, was duly executed according to the provisions of the Wills

(1) [1917] A. C. 115, 125.
(2) [1917] A. C. 115.
(3) (1845) 4 Notes of Cases, 280.
(4) [1906] 1 Ch. 768.

Act, 1837. The President by his final decree pronounced for the validity of the last will and testament of Frances Emmeline Shaw, the deceased, in the action, and the decree contained the words "Terms to be filed and made a rule of Court." These terms are those to which I have already referred. The only point that is material in them is the provision as to the filing of the terms and making them a rule of Court. An application in a summary way was made to enforce those terms and for leave to issue execution. The administratrix claimed to deduct income tax. The registrar held that she was entitled to do so and the judge reversed his decision.

The question is whether that order of the judge reversing the decision of the registrar is right. I am of opinion that it is erroneous. The sum agreed to be paid is obviously an annuity. It is a sum of "300*l.* per annum during his life out of the estate as from the date of death, payable half-yearly." Such an annuity is chargeable with income tax by s. 102 of the Income Tax Act, 1842, which imposes this duty. That section provides that "Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or for any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of . . . . without deduction, according to and under and subject to the provisions by which the duty in the third case of Schedule (D) may be charged . . . . " In my opinion the annuity here is a charge on the property vested in the administratrix not by virtue of any deed or will, but by virtue of the contract entered into by the parties by way of compromise of the action. This is an annuity within s. 102, and it is chargeable with income tax. That being so, s. 40 of the Income Tax Act, 1853, clearly provides for the deduction of the duty. It enacts that "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract,

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whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for the refusal so to do . . . ." Here the administratrix is the person liable to pay the annuity, not personally, but as administratrix, out of the estate liable thereto as a charge on the property.

It is suggested by Mr. Finlay that the effect of the contract was not to charge the property with the payment of the annuity; but in my opinion the contract did constitute a good equitable charge on the estate, and it is clear that the case comes within s. 40 of the Income Tax Act, 1853, and that the administratrix was therefore entitled to deduct and retain the amount of the income tax.

It was urged that, having regard to the recent decision of *Brooke* v. *Price* (1), the income tax was not deductible. That was a simple case, and seems to me to have no application to the present. The contract there was to divide the annual net income after all income tax on the whole had been paid. All that case decided was that a contract to divide the annual net income after all deductions had been made is not subject to, and does not give rise to, a further deduction of income tax.

Then reference was made to *Blount* v. *Blount* (2), decided by Scrutton J. That was an action on a covenant in a deed. Before the deed was entered into an order had been made by consent in the Divorce Court by which the defendant was ordered to pay to the plaintiff permanent maintenance at the rate of 62*l.* 10*s.* per quarter "free of income tax." After that order, by deed which recited the order, the defendant covenanted to pay to the plaintiff during her life the quarterly sum of 62*l.* 10*s.*, and *Blount* v. *Blount* (2) was an

(1) [1917] A. C. 115. (2) [1916] 1 K. B. 230.

action brought on that deed to recover the amount of the income tax on one quarter's payment which the defendant had deducted. It was held that the covenant to pay the quarterly sum of 62*l.* 10*s.* "free of income tax" was void under s. 103 of the Act of 1842, and that the defendant was therefore entitled to make the deduction.

But it was said that if proceedings were taken in the Divorce Court under the order of the President the defendant might not be able to justify the deduction of the amount of the tax. Mr. Finlay argued in this case that the present position was identical with what was said might be the subsequent position in the Divorce Court in *Blount* v. *Blount* (1), and insisted that he had here an order of the Court under which he was entitled to treat the agreement as an order of the Court for payment of a sum of money. But there is here only an order making the terms a rule of Court. There is no judgment against any one to pay, as there was in *Blount* v. *Blount* (1), "free of income tax." And to find out what the terms were which were made a rule of Court you must go back to the terms themselves.

In my opinion any practice of the Divorce Court ordering payment of alimony or permanent maintenance free of income tax has no bearing on the question we are considering, and we are thrown back on the contract by the terms of which there is only a provision to pay an annuity. Here there is merely a contract which is none the less a contract because it is made enforceable in a summary manner. In my opinion the order of Horridge J. should be discharged. The defendant is entitled to deduct the income tax.

WARRINGTON L.J. I am of the same opinion. The parties to the probate action compromised it by an agreement one of the terms of which was "defendant to be paid 300*l.* per annum during his life out of the estate as from date of death by half-yearly payments." By the decree following those terms the terms were directed to be filed and made a rule of Court, but there was no judgment in which those terms were merged. In my opinion, notwithstanding that the terms were made a rule of Court, the liability to pay the annuity remains contractual. The effect of making the terms a rule of Court

(1) [1916] 1 K. B. 230.

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enables the terms to be summarily enforced without the necessity of bringing an action. The terms make the payment a charge on the estate. An annual sum to be paid out of the estate is as good an equitable charge as any I have heard of.

Next I think it is clear that the administratrix is the person liable to make the payment out of the property in her hands. The most convenient course is to turn to s. 40 of the Act of 1853. That section provides: [His Lordship read the section and continued:] The administratrix here, being the person liable to pay, has made the payment and deducted the income tax, and she is therefore acquitted and discharged of the amount so deducted for income tax as well as of the cash paid for the annuity.

There is no material difference between s. 40 of the Act of 1853 and s. 102 of the Act of 1842. Textually there is a difference. In s. 102 the words are "by virtue of any deed or will or otherwise." Sect. 40 does not insert those words. The final sentence of s. 103 of the Income Tax Act, 1842, providing that "all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly null and void" has no application to the present case, because there is no contract here for the payment of an annuity free from income tax. Even if there had been an order directing the administratrix to carry the terms into effect, it would have made no difference, as the agreement to pay without deduction of income tax would be null and void under s. 103.

The cases with regard to alimony or permanent maintenance have no bearing on this case, as where the Court orders alimony to be paid free from income tax such an order is not hit by s. 103 of the Act of 1842 as distinct from an agreement.

In my judgment the order of the judge below must be discharged and the appeal allowed.

SCRUTTON L.J. I am of the same opinion. The result is clear when one understands what is not the case to be decided here. This is not a case where the parties have provided for certain deductions and have then divided the residue. It is not a case where the parties have agreed to divide free of income tax. That distinguishes the

decision in *Brooke* v. *Price* (1), because the parties here did not provide for the deduction of income tax.

This is not a case like *Blount* v. *Blount* (2), where the parties came to the King's Bench Division to enforce a covenant that sums in respect of permanent maintenance should be paid free of income tax and failed, but afterwards succeeded in enforcing the order to the same effect in the Divorce Court, because there is here no decree which the defendant is able to enforce in the Divorce Court. When one has cleared away those two classes of cases one finds here an agreement to pay an annuity, in which there is nothing said about freedom from income tax, made a rule of Court, and the effect is that under s. 40 of the Act of 1853 the person liable to pay the annuity is directed to deduct the income tax. In my opinion the administratrix is right in so doing.

Appeal allowed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Boote, Edgar & Co., Manchester; Pritchard, Englefield & Co.*

(1) [1917] A. C. 115. (2) [1916] 1 K. B. 230.

W. I. C.

1917
Dec. 12, 14.

ADMIRALTY.

THE CARDIFF HALL.

[1917, fol. 3.]

Admiralty—Collision—Navigating without Lights—Absence of Negligence —Practice—Costs.

The plaintiffs' and the defendants' vessels, navigating without lights in accordance with Admiralty directions, came into collision and both received damage. The Court held that there was no negligence on the part of either vessel, and gave judgment for the defendants on the claim and for the plaintiffs on the counter-claim. On the question of costs :—

Held, that, as nearly eighteen months had elapsed before the plaintiffs commenced proceedings, during which time the defendants had taken no steps to recover their damages from the plaintiffs, it appeared that there would have been no litigation if the plaintiffs had not issued their writ, and, therefore, that there must be judgment for the defendants on the claim with costs and for the plaintiffs with costs on the counter-claim, and not, as contended by the plaintiffs, no costs on either side.

Action of Damage by Collision.

The plaintiffs were the owners of the *Mauretania*, a quadruple screw steamship of 30,704 tons gross, bound from Mudros to Naples in Admiralty service.

The defendants and counter-claimants were the owners of the *Cardiff Hall*, a screw steamship of 3994 tons gross, on a voyage from Malta under sealed orders from the Admiralty, and laden with a full cargo of coal and general goods.

The collision took place shortly before 3 A.M. on July 24, 1915, in the Greek Archipelago.

In accordance with Admiralty orders, as a precaution against enemy submarines, no under-way lights were being exhibited on either vessel. It was a dark night, and the Court held on the facts that the vessels were so close when they saw and began to act for each other, that whatever either did or did not do probably had no effect on the collision ; and, even if it had, such action or failure to take action under the stress of suddenly becoming aware of the presence of the other vessel at close quarters could not be regarded as negligence. Judgment, therefore, was entered for the defendants on the claim and for the plaintiffs on the counter-claim.

On the question of costs :

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THE CARDIFF HALL.

Laing, K.C., and *Raeburn*, for the plaintiffs. In effect the Court has found that the collision was the result of an inevitable accident, and the ordinary rule in inevitable accident cases is for each side to pay their own costs : *The Marpesia.* (1) Neither side has pleaded inevitable accident, and the defendants have taken their chance just as much as the plaintiffs of getting a decision in their favour. In these circumstances it would be unfair for the bulk of the costs to fall upon the plaintiffs, which would be the result if there were judgment for the defendants on the claim with costs and for the plaintiffs on the counter-claim with costs.

Bateson, K.C., and *Dumas*, for the defendants. In the absence of special circumstances costs follow the event even in inevitable accident cases : *The Batavier.* (2) Further, the plaintiffs started the litigation. Nothing was done for some eighteen months, and then the plaintiffs wrote about the matter to the defendants and on December 22, 1916, issued the writ in the Liverpool District Registry. The defendants would have been content to let the loss lie where it fell in each case.

HILL J. I have made orders of both kinds and have purposely drawn distinctions in cases of this sort. Where both sides have voluntarily gone into litigation I have ordered each side to pay their own costs, it being a mere accident that the one party is plaintiff and the other defendant. In this case, however, there would have been no litigation if the plaintiffs had not issued their writ. There will be judgment for the defendants on the claim with costs, and for the plaintiffs on the counter-claim with costs. I think that is the general rule unless there is some reason for departing from it, and I do not see any reason in this case.

Solicitors for plaintiffs : *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants : *Holman, Fenwick & Willan, for Lean & Lean, Cardiff.*

(1) (1872) L. R. 4 P. C. 212. (2) (1889) 15 P. D. 37.

E. C. T.

1917
Dec. 19, 21.

(In Prize.)

THE BAWEAN.

[1917, No. 1554.]

Prize Court—Cargo laden in Enemy Vessel—Transfer in Transitu—Sale by Enemy Owners to Neutral Purchasers—Transhipment into Neutral Vessel—Cargo warehoused in British Port—Seizure as Prize—Protection of Neutral Flag—Declaration of Paris, art. 2.

Before the outbreak of war some cases of tea were shipped at a Chinese port on a German vessel bound to Hamburg. The tea was consigned to a firm at Bremen. War having broken out after the vessel sailed, she put into the Dutch port of Padang for refuge, where she remained. In May, 1916, the Bremen firm sold the tea, which was still lying in the German vessel, to a firm of Dutch merchants at Amsterdam, who paid for the tea, and it was transhipped into a Dutch vessel for carriage to London, where the buyers intended to sell it through a firm of brokers. On the arrival of the Dutch vessel at London the tea was discharged and warehoused in the Port of London, where it was subsequently seized as prize on the ground that it was enemy property. The Dutch merchants claimed its release on the ground that it was neutral property and had not an enemy destination :—

Held, that as, according to prize law, goods which belong to an enemy, when shipped, retain their enemy character until they reach their destination, the tea could not be transhipped into a neutral vessel with an altered destination so as to affect the rights of a belligerent; that the transfer to the Dutch merchants was invalid; and that the goods still possessed an enemy character.

Held, further, that the protection afforded to enemy goods on a neutral vessel under art. 2 of the Declaration of Paris did not apply to goods transhipped from an enemy vessel, and that, even if it did, they ceased to have the protection of the neutral flag when landed and warehoused, and were accordingly subject to condemnation.

Action for Condemnation of Cargo.

The facts, which are more fully set out in the judgment, shortly were as follows :—

In July, 1914, the German steamship *Kleist* loaded at a Chinese port 922 cases of tea which had been bought by, and were consigned to the order of, the firm of Michaelsen & Sons, of Bremen. The *Kleist* was bound for Hamburg, but in consequence of the outbreak

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of war she took refuge on August 7, 1914, in the Dutch port of Padang in Sumatra, where she remained.

In May, 1916, the cargo being still on board, Michaelsen & Sons sold the tea to the claimants, Goldschmidt & Zonen, a firm of Dutch merchants at Amsterdam, and it was transhipped into the Dutch steamship *Bawean*. Fresh bills of lading were made out dated September 6, 1916, whereby the tea was consigned by L. E. Tels & Co., the claimants' agents in Padang, to the claimants at London, where it was arranged that a firm of brokers, Batten & Co., should sell it for them. On September 19 the claimants sent a cheque for the purchase price, 7119.68 fl., to Michaelsen & Sons, who acknowledged its receipt on September 28. It appeared, however, from other documents produced by the claimants that the purchase was really made for the joint account of the claimants and L. E. Tels & Co. On December 12 the *Bawean* arrived in London, and the cases of tea were discharged and warehoused at a wharf in the Port of London. On January 24, 1917, they were seized as prize as belonging at the time of capture and seizure to enemies of the Crown.

1917. Dec. 19. *C. R. Dunlop*, for the Procurator-General. This was not a genuine transaction; but even if it were the goods are liable to condemnation. In a state of war, existing or imminent, property is deemed to continue as at the time of shipment until actual delivery: *The Vrow Margaretha*. (1) The claimants never got possession of the goods, and a captor's rights cannot be defeated until actual delivery: *The United States*. (2) The claimants are mere intermediaries to get enemy property transhipped from an enemy into a neutral vessel, and in such a case the transhipment must be disregarded: see *The Jeanne*. (3)

Stuart Beavan, for the claimants. The contention of the Crown that these goods were still in transit cannot be supported. There was a firm contract with the claimants, who obtained possession of the goods at Padang through their agents, Tels & Co., and paid for the goods. In the cases relied on by the Crown there were no executed contracts of sale and no delivery of the goods. In *The*

(1) (1799) 1 C. Rob. 336; 1 Eng. P. C. 149.

(2) [1917] P. 30.

(3) [1917] P. 8, 9, n.

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THE BAWEAN.

Jeanne (1) the alleged neutral consignees were held to be merely intermediaries for the ultimate enemy consignees.

Even if it could be held, according to prize law, that the transfer was inoperative, and that the goods remained enemy property, they had not a contraband destination and are still entitled to the protection of the neutral flag under art. 2 of the Declaration of Paris.

Dunlop in reply. When goods have been landed they are no longer under the neutral flag: see *The Batavier II.* (2) Further, goods transhipped from an enemy vessel must be regarded as if still in the enemy vessel for purposes of prize: *The Jeanne.* (1) This was a transfer in transitu after the outbreak of war, and constituted a fraud on belligerent rights; it is therefore invalid: *The Jan Frederick.* (3)

THE PRESIDENT (SIR SAMUEL EVANS). In this case 922 cases of tea weighing about 32 tons gross and about 24 metric tons net were shipped on a German vessel, the *Kleist*, belonging to the Norddeutscher Lloyd. The goods were going to Hamburg. It has been assumed that they were shipped on board this German vessel before the war; but after war broke out, namely, about August 7, the vessel took refuge in the port of Padang in Sumatra. She took refuge in order to escape capture herself, and no doubt also in order to protect the German goods that were on board from capture.

The vessel with the goods on board remained at Padang from this date in August, 1914, until May, 1916—a period of about a year and nine months. Towards the end of May an arrangement was come to between the firm of Michaelsen & Sons, of Bremen, to whom the tea was consigned, and certain Dutch merchants, Goldschmidt & Zonen, of Amsterdam, for the purchase of the tea. That arrangement was carried out by a contract of sale entered into on behalf of Michaelsen & Sons, the owners of the tea, by a man named Wyngaard, of Amsterdam, and is evidenced by a letter of May 22, 1916. After stating what the goods were by marks and weights, some terms of purchase are set out in the letter of Wyngaard as follows: "The total of 922 cases at the price of 15 cents per ½ kilo"—that

(1) [1917] P. 8, 9, n.
(2) See note, post, p. 66.
(3) (1804) 5 C. Rob. 127; 1 Eng. P. C. 434.

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The President.

is at the price of about 3*d.* per lb.—" original invoice weight (piculs calculated at 60½ kilos), cash 1 per cent."—deduction, I suppose that is—. " These lots are in the s.s. *Kleist*, belonging to the North German Lloyd, which steamer is lying at Padang. The expenses incurred on these lots up to May 31, 1916, namely, freight as far as Padang, and also the expenses incurred in the port of refuge and demurrage until May 31, 1916, are settled in account by the sellers with the North German Lloyd. The expenses which occur after May 31, 1916, are for the buyers' account and amount to ½ per cent. per month on the value of the goods for demurrage due to the North German Lloyd." Then comes this term upon which reliance has been placed on behalf of the claimant. " This purchase is solely valid in case the purchaser can be placed in possession of the parcel. If the captain of the s.s. *Kleist* refuses to deliver the parcels, or if, owing to some other cause, the parcels are not delivered on tendering the bills of lading or delivery orders, this purchase is to be deemed to be cancelled. Payment takes place after the buyers have taken possession of the parcels in Padang, and the buyers bind themselves to give instructions to their connections in Padang to telegraph as soon as the delivery has taken place. After the receipt of that telegram the buyer pays the amount to the sellers." A firm of L. E. Tels & Co., of Amsterdam, who also had either a branch or some agents or representatives at Padang, appear to have acted afterwards for the purchasers, Goldschmidt & Zonen, and by a letter of June 9 the Amsterdam firm, Tels & Co., inform their representative at Padang of the contract which has been made between Michaelsen & Sons and Goldschmidt & Zonen. In that is contained this passage : " If there is no objection we request you to receive 922 cases and to ship them to London, the bills of lading to be made out to the order of Goldschmidt & Zonen, and to be sent to our address." At that time and for some considerable time afterwards Tels & Co. were involved in this transaction with Goldschmidt & Zonen on a joint account. It was anticipated by both—and I daresay rightly—that so far as they were concerned it might turn out to be a profitable adventure, as they were buying the tea so cheaply, and might be able to sell it in London at a very much better price. Pursuant to that arrangement for a joint adventure Goldschmidt & Zonen sent to Tels & Co. an account on November 3,

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1916, giving certain figures with a balance amounting to a total of over 10,000 fl., for which they sent a cheque. It is said that on or about that date in November Tels & Co. for some reason backed out of the joint transaction and were allowed to remain outside of it by Goldschmidt & Zonen. What became of the cheque I do not know—whether it has been returned I cannot say. There is no information before the Court at all upon that subject, and I do not know now how the matter stands as between Tels & Co. and Goldschmidt & Zonen. It is left in obscurity, and gives rise to some suspicion.

It was intended, if the property could be got hold of at Padang, that the goods should be sold in London, and for that purpose, when the goods had been shipped upon a Dutch vessel, the *Bawean*, that the bills of lading should be for London, to the order of Goldschmidt & Zonen, and that they should be sold for them by a firm called Batten & Co. Reliance has been placed upon that as showing some bona fides; but I am not quite sure whether that is the proper character to be given to it. The Dutch vessel could not very well carry the goods to Hamburg without the risk of their being captured; because unquestionably the goods, if they were put upon the Dutch vessel and captured on their way to Hamburg, would partake of the enemy character which attached to them before the transhipment on to the Dutch vessel; and in all probability it was seen and appreciated, not only by Goldschmidt & Zonen, but by Michaelsen & Sons too, that if they were to get anything out of this large quantity of tea other than a total loss the only way to effect that was to make some arrangement by which the tea should be sold in some neutral country or in London.

Now I have to ask myself two questions—one a question of law and the other a question of fact.

What in fact was the meaning and object of the plan which was adopted? I have no doubt that the intention of Michaelsen & Sons, and a very natural one, was to save something from the burning. They had a valuable cargo of tea; it might become useless if they kept it longer, while if they themselves transhipped it it might suffer risk, and, as I have said, they wanted to get something out of the burning. It was no good sending it to Germany; so they went to Goldschmidts. Goldschmidt & Zonen knew the whole

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situation. They knew that the *Kleist* was a North German Lloyd ship. They knew that she had taken refuge in this far-away port for a year and nine months, and they were minded, I have no doubt, to make some profit for themselves; but they were also minded—I do not like to use the word conspiracy, but I do not know that it is too strong—to enter into a little conspiracy with Michaelsen & Sons whereby Michaelsen & Sons would get some benefit out of this property which had practically become abandoned, and they would also make a profit for themselves. The object on the part of both, in my view, was to defraud the belligerents of their rights of capture, and partially to assist the enemy owners; and with that object, and by the arrangement made through Tels & Co., the goods were transhipped from the German vessel into the *Bawean*. There was a communication with the consuls, and, putting it shortly, the result of the communication was this: Tels & Co. asked for the consent of the British vice-consul in Padang, and afterwards of the British consul in Batavia to the shipment, and afterwards proceeded as if consent had been given. That is the reading in plain English of the documents. Tels & Co. must have represented to the people concerned that there was no objection on the part of the consul, and in one sense that was literally true, but not in the sense in which it was accepted by the parties. The answer of the consul at Batavia to the vice-consul or his deputy at Padang was this: "Your telegram to-day, tea to London, I shall not object to shipment since system referred to in my despatch of 29th July is not yet in operation." That is to say, I will take no active step to prevent it. Then it proceeds: "The question as to whether shipment is in order rests entirely with Tels Company, and you should express no official opinion in matter and give no official assistance by way of certificate or otherwise."

That did not authorize the vice-consul at Padang to express the opinion as coming from the consul at Batavia that he had no objection to the shipment. The statement of fact in the telegram was "I am not going to take any steps to object," but the instructions given by the consul were "You must express no official opinion." To say that he had no objection would be expressing an opinion. In this way the goods were got on to the *Bawean* from the *Kleist*.

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Now what is the effect in law? It is quite clear law according to the Prize Courts in this country, and in America too (and I think in Germany also), that goods which belong to an enemy when they are once shipped, and therefore become subject to the risk of capture at the hands of belligerents, will retain their enemy character until they reach their destination, and no transfer to a neutral will be effective so as to defeat the right of capture unless the transferee has actually taken possession of the goods. Now I think the destination of these goods, in the sense of that principle of law, was the destination of Hamburg. In my view the goods could not be transhipped from a German vessel on to another vessel with the destination changed so as to affect the rights of a belligerent. If that is not so, the effect of it would be that at the beginning of the war all cargoes upon German ships which might then be afloat, if they could be transferred, might legally be transferred to any neutral, and, therefore, all these cargoes would escape capture. That, I think, is not prize law. The doctrine has been laid down quite clearly in cases beginning with *The Vrow Margaretha* (1) and extending to later dates. I am not going through them; but perhaps it is as well to refer to two cases. In *The Jan Frederick* (2) the question was fully gone into by Sir William Scott, and he lays down the principles in general terms. I will cite a few passages only. "But in time of war this is prohibited as a vicious contract; being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed, would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. . . . . If the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives . . . . such a contract cannot be held good, on the same principle that applies to invalidate a transfer in transitu in time of actual war." And in

(1) 1 C. Rob. 336. (2) 5 C. Rob. 127, 131, 140; 1 Eng. P. C. 434.

discussing the question as to whether the contract was entered into bona fide, at the end of the judgment Sir William Scott pronounced as follows: "But taking it to be a bona fide contract, yet being formed in transitu, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid; and I pronounce this property subject to condemnation." The ground there put is this: to allow such transfers while the goods were in transit after the outbreak of war (and the same doctrine applies before the outbreak of war if it is imminent, or if the transaction takes place in contemplation of war) would be to encourage frauds on the rights of capture by belligerents. You cannot always prove the object in a man's mind. I have stated what, in the inference I draw, was one of the objects Goldschmidt & Zonen had in view in this case, but I cannot say that there is an absolute proof of it. But in order to close any investigation in the difficult matter of determining motives the law has pronounced that such transfers as this cannot be valid during war because it would be so easy thereby to defeat the rights of belligerents.

There is only one other case that I want to refer to, namely, *The Carl Walter*. (1) I cite that case because it illustrates the same principle and shows that it does not matter that the goods have been changed from one ship to another. Nor, in my view, does it matter that after the change of the goods from an enemy vessel to another constructive possession is taken by the master of the vessel and a destination for some other country substituted in the hope that the goods would not be seized before their actual receipt or delivery. On both these grounds—the ground of my inference as to the facts, and on the question of law—I hold that this transfer to Messrs. Goldschmidt & Zonen was invalid, and that the goods still partook of an enemy character at the time that they were upon the sea after they were transferred to the Dutch vessel and when they were seized.

One other circumstance must be adverted to. Counsel for the claimants contended that they were entitled to some protection because the goods were under the Dutch flag. In my view of the

(1) (1802) 4 C. Rob. 207.

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case the Declaration of Paris does not apply; but in any event, in the circumstances of this case, the Dutch flag had ceased to protect these goods. They were in port at the time they were seized, and, according to previous judgments in this Court, if the Declaration of Paris ever was a protection to this vessel (and I have expressed my opinion that it was not) it had ceased to have any such effect at the time the goods were seized in port, after they were discharged from the Dutch ship.

I, therefore, condemn these goods or their proceeds.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *Waltons & Co.*

Note.

THE BATAVIER II.

[1917, No. 1300.]

In this case the Procurator-General claimed the condemnation as enemy property of a quantity of cane brought to London before the outbreak of war in the *Batavier II.* and six other ships and stored at various wharves in the Port of London by Elkan & Co., Limited, continental forwarding agents. The consignments of cane had been shipped by and on behalf of the firm of Flersheim, Hess & Co., of Frankfort, and had come from Germany and from Singapore. A controller, Mr. Whinney, had been appointed by the Board of Trade under the Trading with the Enemy Act, 1915, to control the business of Elkan & Co., Limited, and he gave information to the Admiralty Marshal, with the result that in August, 1916, the canes were seized as prize and droits of admiralty.

1917. June 8. THE PRESIDENT (SIR SAMUEL EVANS). These enemy goods, discharged from various vessels, were warehoused at the time of the outbreak of war at various wharves, described in the affidavit of Mr. Whinney, and, according to the decisions in *The Roumanian* (1) and *The Eden Hall* (2) they are subject to seizure as droits of admiralty. The only question which arises is whether the goods, which have been brought in on the *Batavier II.* and the *Batavier VI.*—which were two neutral vessels—are protected by the Declaration of Paris. I am not bound by the case of *The Dandolo and The Caboto* (3) in the colonial Prize Court of Colombo, Ceylon, but I have pleasure in saying that I think those cases were properly decided. The two articles of the Declaration of Paris which affect this matter are arts. 2 and 3, and they

(1) [1916] 1 A. C. 124. (2) [1916] P. 78.
(3) (1916) 2 Br. & Col. P. C. 339.

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read as follows :—Art. 2 : "The neutral flag covers enemy's goods, with the exception of contraband" ; and art. 3 : "Neutral goods, except contraband of war, are not liable to capture under the enemy's flag." These goods, no doubt, had been under the neutral flag ; but they were no longer under the neutral flag at the time of seizure, nor at the outbreak of war, as I understand, and therefore no difficulty arises, in my opinion, under the Declaration of Paris.

I declare that they were properly seized, and I condemn the proceeds accordingly as droits of admiralty.

E. C. T.

ADMIRALTY.

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THE EMLYN.

[1917 S. 41.]

Admiralty—Collision—Navigation of convoyed Vessels in Fog—Admiralty Orders—"Follow escort and obey his orders"—Failure to stop Engines—Excessive Speed—Regulations for Preventing Collisions at Sea, art. 16.

The plaintiffs' steamship *S.* and the defendants' steamship *E.*, both under escort, came into collision off the coast of France during a dense fog. The *S.* was proceeding at two to three knots, the *E.* at eight knots ; and both vessels and their escorts were sounding their whistles for fog. Each vessel went astern when the other came into sight, but the *S.* did not stop her engines on hearing the whistles of the *E.* forward of the beam. The *E.'s* evidence was that she did not hear the whistles of the *S.* or her escort.

It was argued that the non-stopping of the *S.* and the excessive speed of the *E.*, in breach of art. 16 of the regulations, were justified respectively on the grounds—(1.) that by the orders of the French Admiralty authorities the vessels had to follow their escorts and obey their instructions ; (2.) that the circumstances of the war and the risk of enemy submarines justified a departure from the regulation ; and (3.) in the case of the *E.*, assuming the whistles were heard, that the presence of other vessels of the convoy astern of her prevented her stopping :—

Held : (1.) that even assuming the orders were compulsory they could not be construed as orders to disobey art. 16 ; (2.) that there was no evidence that the danger of submarines in the particular locality made it necessary for the *E.* and her escort to go full speed ahead in a dense fog ; and (3.) that the presence of other vessels

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of the convoy astern of her was no justification for the *E.* not stopping her engines.

Both vessels therefore were to blame in the proportions of two-thirds to the *E.* and one-third to the *S.*

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *Sheila*, a screw steamship of 453 tons gross, of the port of Ayr; the defendants and counter-claimants were the owners of the *Emlyn*, a screw steamship of 379 tons gross, of the port of Cardiff.

The action was heard in camera. The arguments sufficiently appear from the judgment, which is reported in full with the approval of Hill J., omitting only the courses, place of collision, and nature and disposal of the escorts.

Laing, K.C., and *John B. Aspinall*, for the plaintiffs.

Bateson, K.C., and *Lewis Noad*, for the defendants.

HILL J. The collision in this case took place on June 14, 1917, in fog so thick that each ship saw the other at a distance which is pleaded at about 300 feet, but according to the evidence was less than that. The *Sheila* was passing up the coast following her escort. The *Emlyn* was proceeding down the coast and formed part of a convoy. She was immediately following her escort, and there were other vessels of the convoy behind her.

The case for the plaintiffs is that the *Sheila* was following her escort; that fog had come on half an hour before, and during that half-hour she had not had the escort in sight but was following her at a speed of two to three knots, and sounding for fog, as was the escort. For some twenty minutes the *Sheila* heard the fog whistles of several steamers on the port bow and still continued at two to three knots. She passed the escort of the *Emlyn*, and then saw the *Emlyn* with her starboard side open four points on the port bow and distant, according to the pleadings, 300 to 400 feet, but according to the evidence, 155 to 230 feet. The engines were immediately put full speed astern, but the collision happened, the stem of the *Emlyn* striking the port side of the *Sheila* abreast of No. 1 hold.

The case for the defendants is that the *Emlyn* was making about eight knots and sounding her whistle for fog; that she had entered

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the fog about an hour before the collision and had continued to follow her leading escort by the wake and the sound of her whistle. No whistles at all were heard from either the *Sheila* or her escort, and the *Sheila* was sighted about 300 feet away on the starboard bow, on a bearing which, according to the evidence, was about two points. She was seen to be swinging under a port helm showing her port side, and the engines of the *Emlyn* were immediately put full speed astern.

Witnesses from each side in placing the models made the angle of the blow some six or seven points. In their evidence they spoke of three to four or four to five points. I doubt if it was as broad as shown by the models, but it was certainly, on all the evidence, not a fine angle, but one of at least four points, and that involves either that one or both ships were on a very different course from that alleged by them, or that one or both altered considerably from that course. This raises questions of fact which upon the evidence are very difficult to determine. I have only seen in Court two witnesses from the *Emlyn ;* the rest of her evidence is on paper, and so is all the evidence of the *Sheila.* I have not had the advantage of having any evidence from either of the escorts.

Apart, however, from these difficult questions, I have no doubt upon the admitted facts that each ship is to blame for breach of art. 16. The speed of the *Emlyn* was admittedly eight knots. As to the speed of the *Sheila,* having regard to the time she left port, to the tide, and to the place of collision, I see no reason for doubting that she was making during the period of fog two to three knots, a moderate speed. Admittedly, hearing whistles forward of the beam, the *Sheila* did not stop her engines, but continued at her moderate speed until she sighted the *Emlyn.* As to the *Emlyn,* she never stopped her engines before she sighted the *Sheila,* but her evidence is that she never heard any whistles forward of the beam except the whistles of her own escort.

On these admitted facts the *Emlyn* is clearly to blame for excessive speed, and the *Sheila* for not stopping her engines, unless there were special circumstances justifying the speed of the one and the failure to stop the engines of the other. I think also that the *Emlyn* is to blame for insufficient look-out if she did not hear the whistles of the *Sheila* and her escort, which I have no doubt were being sounded,

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or for not stopping her engines if she did. She says she did not hear them. No doubt there were many whistles blowing, but apart from the *Emlyn's* escort only the *Sheila* and the *Sheila's* escort were sounding ahead at the material time. I expect the *Emlyn* was so intent on following the wake of her escort that she neglected to keep alert to the chance of approaching vessels.

Was the speed or was the non-stopping of the engines justified? It is said that they were, first, because of orders received from the French Admiralty authorities; and, secondly, because the circumstances of the war and the risks of submarines justified a departure from the rules. I cannot agree.

First, as to orders. They were, to the *Sheila:* "Follow the escort, obey all his orders"; and to the *Emlyn:* "Follow escort—speed will be regulated by the patrol ahead—at eight knots." These orders were not directed to speed in fog, and, even assuming they were compulsory upon the ships, as to which there is no evidence, they cannot be construed as orders to disobey art. 16. Nor can the facts that the escort continued at eight knots and did not stop her engines excuse the convoyed ship from obeying art. 16. It was negligence in the escort and no less negligence in the convoyed ship.

As to the second point, there is no evidence on which I can find that dangers of submarines in the locality in question made it necessary to go full speed in a fog or not to stop the engines and navigate with caution. I can in the present case see no necessity in either the escorting or the escorted ship for such conduct.

It is further contended for the *Sheila* that the non-stopping of the engines did not contribute to the collision. I cannot agree. If it had been done the position would have been quite different and the ships would not have been in this collision.

It is further contended for the *Emlyn* that her not stopping (if she had heard whistles ahead) was justified by the presence of the rest of the convoy astern. The question does not really arise, for she says she did not hear whistles ahead. But, if it does arise, I have asked the Elder Brethren whether in the circumstances there was anything to prevent the *Emlyn* stopping, and whether it was cautious and prudent navigation to continue on without stopping. They advise me that it was not. In this connection I will quote the

observations of Gorell Barnes J. in *The Star of New Zealand* (1): "If the vessel stopped, it does not follow that she was to remain stationary in the place where she stopped her engines. She would naturally have some way on, and as soon as she heard whistles approaching astern, if they got too close she could move on again; and also the other vessels which might be astern would be equally bound to stop, as she was, for the vessels which they found ahead of them. Therefore the Elder Brethren are of opinion that there was no danger for the vessels astern which would at any rate justify the master in neglecting to stop in due and proper navigation for a vessel ahead." Both vessels, therefore, are to blame for a breach of art. 16. But so far the fault of the *Emlyn*, going at eight knots, is much greater than the fault of the *Sheila*, going at two to three knots, and not stopping. It is said, however, that the *Sheila* must have ported across the line of the approaching convoy whose whistles she had heard, and therefore that she must be to blame for taking helm action. The burden of establishing this is on the *Emlyn*. It is not, to my satisfaction, established. The evidence is in direct conflict, and having examined all the probabilities they seem to me to be equal on both sides. I dislike deciding a case on onus, but where the facts and probabilities really leave the matter in complete doubt I ought not to decide the question in the absence of convincing evidence. The case is therefore left on the breach of art. 16.

I find both vessels to blame in the proportions of two-thirds to the *Emlyn* and one-third to the *Sheila*.

Solicitors for plaintiffs: *Bolam, Middleton & Co., Sunderland.*

Solicitors for defendants: *Botterell & Roche, for Downing & Handcock, Cardiff.*

(1) (1899) *Shipping Gazette*, Nov. 6.

E. C. T.

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Nov. 7.
1918
Jan. 25;
Feb. 1.

ADMIRALTY.

THE PURFLEET BELLE.

[1917, fol. 258.]

Admiralty—Collision—Unlighted Vessel at Anchor—Prohibition to exhibit Lights—Duty to give Warning to approaching Vessels Vessel under way during prohibited Hours—Thames and Medway Regulations made under Defence of the Realm (Consolidation) Regulations, 1914.

The defendants' steamship *P. B.* was proceeding down the Black Deep channel, in the Thames estuary, at a speed of seven knots at night, when vessels were forbidden to be under way in that channel by the Traffic Regulations for the Thames and Medway, made under the Defence of the Realm Regulations. She came into collision with the plaintiffs' steamship *S. F.* at anchor. In accordance with the same regulations the *S. F.* was not exhibiting an anchor light, The *P. B.* justified being under way by reason of Admiralty orders to be at a particular place by a certain time:—

Held, that both vessels were to blame in equal degree; that even if the regulations prevented the *S. F.* showing a light to avoid immediate danger, they did not prevent her ringing her bell or giving some other effective warning of her presence when she saw the *P. B.* approaching with risk of collision; and that, as regards the *P. B.*, the Admiralty orders did not necessarily involve her getting under way when she did or proceeding by the Black Deep, and that she also was to blame for being under way and for proceeding at an excessive speed when she knew that there might be unlighted vessels in the channel.

Action of Damage by Collision.

The plaintiffs were Cory Colliers, Limited, the owners of the steamship *Sir Francis;* the defendants and counter-claimants were the owners of the steamship *Purfleet Belle.*

The collision took place about 4.15 A.M. on March 20, 1917, in the Black Deep, Thames estuary. The *Sir Francis* was lying at anchor above the Sunk Head buoy, where she had brought up the previous evening when darkness set in. In accordance with the Traffic Regulations then in force for the Rivers Thames and Medway made under the Defence of the Realm (Consolidation) Regulations, 1914, she was not exhibiting an anchor light, but her case was that,

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on observing the lights of the *Purfleet Belle* coming down the river, a powerful light from an electric torch was shown.

The case for the *Purfleet Belle*, which had received Admiralty orders to be at a particular place by a certain time, was that no light was shown, and that the loom of the *Sir Francis* was seen about a ship's length away and too close to avoid her.

The action was heard in camera.

The facts and the arguments on the questions raised under the Traffic Regulations, so far as proper for publication, are stated in the judgment.

Aspinall, K.C., and *Balloch*, for the plaintiffs.

Bateson, K.C., and *D. Stephens*, for the defendants.

Cur. adv. vult.

1918. Feb. 1. HILL J. The collision in this case happened early on the morning of March 20, 1917, in the Black Deep. The *Sir Francis*, a steamship of 1991 tons gross and 280 feet long, laden, was at anchor, heading about N. The *Purfleet Belle*, a steamship of 1401 tons gross and 269 feet long, laden, had been at anchor, and was under way, proceeding down the Black Deep towards the Sunk Head. She was one of several vessels which were so proceeding during that early morning, and of these the *Amulet* was the one nearest ahead of her. The collision happened more than one hour before sunrise. The *Sir Francis* was not exhibiting any anchor lights. The *Purfleet Belle* was exhibiting her navigation lights—two masthead lights, side lights, and stern light. There was some question whether she had two or one masthead lights, but I accept the evidence that she had two masthead lights.

The wind was strong from the N.W., and the tide flood, setting to the S.W., with a force of one knot. There was some conflict of evidence as to the weather. It was undoubtedly a night of heavy showers, but on the evidence, as a whole, I find that it was not actually raining at the material time. It was, however, overcast, and there was no moon, and I do not doubt that it is properly described as very dark.

The case for the *Sir Francis* was that the lights of the *Purfleet*

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Belle were sighted approaching and heading for the *Sir Francis;* that an electric torch was shown from the bridge in ample time for the *Purfleet Belle* to take action, and that the *Purfleet Belle* was hailed, also in time for her to take action, but the *Purfleet Belle* did not keep clear, and, though she ported and twice sounded a short blast, did it too late, and, having considerable speed, struck with her stem the port quarter of the *Sir Francis.*

The case for the *Purfleet Belle* was that she was proceeding on a heading of N.E. $\frac{1}{2}$ N., following the stern light of the *Amulet*, and making about five knots; that the loom of the *Sir Francis* was seen ahead, distant, as pleaded, about one length, i.e. about 280 feet, or, according to the evidence, less than two lengths; that the *Purfleet Belle* hard-a-ported, without giving any whistle signal, and went full speed astern, but had not time to clear the *Sir Francis.* According to the defendants no light at all was shown by the *Sir Francis.*

The allegations of negligence made against the *Purfleet Belle* are that she ought not to have been under way at all; that if she was justified in being under way she ought to have been proceeding with the utmost caution, and that her speed was excessive and her look-out deficient; that ample warning was given her by the showing of the electric torch, and that even if no torch had been shown she ought to have seen the ship herself in ample time to avoid her.

On the other hand it is charged against the *Sir Francis* that she ought to have seen the *Purfleet Belle* approaching, and, being unlighted, that she ought to have given the *Purfleet Belle* warning in ample time by showing an adequate light; that she gave no warning at all, and that the reason of that was that she had a bad look-out. Alternatively, it is said that the *Purfleet Belle* was justifiably under way and was proceeding at a proper speed, and that if the *Sir Francis* was justified in showing no light the collision occurred without negligence on the part of the *Purfleet Belle.*

Before considering the difficult questions which arise under the Traffic Regulations made under reg. 37 of the Defence of the Realm Regulations, it is necessary to decide certain questions of fact.

[His Lordship then proceeded to review the evidence as to the speed of the *Purfleet Belle*, which he held to be at least seven knots, and as to whether the *Sir Francis* showed a light to the *Purfleet*

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Belle or gave her any other timely warning. On this point his Lordship said that he was satisfied that the torch was not shown so as to be visible to the *Purfleet Belle*. His Lordship continued as follows :]

So far the facts as I find them are : First, the *Purfleet Belle* was proceeding down at a speed of at least seven knots. Secondly, the *Sir Francis*, at anchor, unlighted, and with the *Purfleet Belle* approaching her and showing all her lights, showed no light and gave no warning to the *Purfleet Belle*, except by hailing her when it was too late for the *Purfleet Belle* to avoid collision. Thirdly, I find that the *Purfleet Belle*, as soon as she did see the loom of the *Sir Francis*, took all the action possible—she hard-a-ported and went full speed astern. I do not believe she sounded any whistle, but that is important only as it affects questions of credibility. Her action very nearly avoided the collision, for the *Sir Francis* was struck 16 feet from the stern.

But the question remains, as a question apart from the Traffic Regulations, whether the *Purfleet Belle* ought to have seen the *Sir Francis* sooner. If she had, she would have taken action sooner and a very short time would have made all the difference. The master of the *Purfleet Belle* says he made out the loom at not more than two lengths, and that the chief officer on the look-out forward reported it at the same time ; and it is said that, on such a night as it was, it could not be visible at a greater distance. Further, as justification for not seeing her sooner, it is said that the *Amulet* was between the *Sir Francis* and the *Purfleet Belle*, and that the glare of the stern light of the *Amulet* would obscure the loom of the *Sir Francis*.

I accept the evidence that the *Purfleet Belle* was following the *Amulet* and that the *Amulet* had the *Sir Francis* right ahead before she ported, and, therefore, that, until the *Amulet* hard-a-ported for the *Sir Francis*, she was between the *Purfleet Belle* and the *Sir Francis*. But upon the evidence as a whole I do not think the *Purfleet Belle* was as close behind the *Amulet* as she says, or anything like it, but, for all that, a light interposed between the *Purfleet Belle* and the *Sir Francis* would make it more difficult to see the *Sir Francis*.

The question is, in these circumstances, ought the *Purfleet Belle*,

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with a good look-out, to have seen the loom of the *Sir Francis* in time to avoid her? I have asked the Elder Brethren whether, with a good look-out, the loom of the *Sir Francis* ought to have been seen in time to avoid her, and they advise me that it is doubtful. And, if doubtful, I cannot hold that the *Purfleet Belle* was negligent in not seeing the loom sooner.

These being the facts, questions of some difficulty arise upon the Traffic Regulations under the Defence of the Realm Regulations, which were applicable to these vessels at the date of the collision. They are to be found in the volume of Notices to Mariners, which was put in. By these regulations, during hours which included the time of the collision vessels were forbidden to "remain under way" in that part of the Black Deep where the collision happened, and vessels at anchor there were forbidden to "exhibit any lights." The *Purfleet Belle* was under way in direct disobedience of that regulation.

It is said that she was entitled to be under way because she had received specific orders from the Admiralty authorities which obliged her to be under way. No doubt, if it had been established that the order was one which could only be obeyed by being under way in that channel at a time forbidden by the regulation, there would be ground for saying, both being under the powers given by the Defence of the Realm Act, that the specific order overrode the general regulation. But it has not been established that the specific orders—which, so far as proved, were that the *Purfleet Belle* was to be at a particular place at an appointed time—necessarily involved that the *Purfleet Belle* should anchor where she did or get under way when she did, or travel by the channel she did. She probably chose the best and safest way of carrying out her orders. But, unless her being under way in prohibited hours was either explicitly or by necessary implication sanctioned by the orders she received, she cannot, in my opinion, justify her disobedience to the regulation. It has not been proved that she was so sanctioned, and I must hold that she was improperly under way.

Being improperly under way, and knowing that vessels might be at anchor, and, if at anchor, then without lights, a very high degree of care and skill was required of her—care in speed and vigilance, skill and promptitude in action. In these circumstances I am

advised, and I agree, that to proceed at a speed of seven knots in a channel like this, where it was known that some ships were and others might be at anchor, unlighted, was a wholly wrong proceeding. That speed was a contributing cause of the collision, and certainly of the damage, and for it the *Purfleet Belle* must be held to blame.

The *Sir Francis* was justifiably at anchor without anchor lights. The regulation forbade her to " exhibit any lights." This does not, I think, refer to lights other than the Sea Regulation lights, for such other lights are forbidden by another regulation which will be found at p. 24 of the book. But the two regulations together did forbid her to exhibit any lights at all. Does that mean that she might not show a warning light even to a vessel which is approaching her so as to involve risk of collision ? Good seamanship would certainly require that she should do so. But, much as I should like to, I do not see how I can read into the regulations an exception such as " unless it is necessary to avoid immediate danger." The Traffic Regulations contain nothing like art. 27 of the Sea Regulations.

At the same time, I am very strongly of opinion that a ship which is lying at anchor without lights, especially in a channel like the Black Deep, and at a time when she knows that, with permission, vessels may be under way and that, in fact, at least one vessel is under way, has a very special duty of keeping a most vigilant look-out and of giving such warning as is possible on the approach of any vessel which is under way.

This duty is recognized in the regulations relating to a different area at pp. 44 and 45 of the book (1), and exists whether the regulation calls attention to it or not. It is recognized by the case put forward by the plaintiffs, who say they discharged it by the exhibition of the torch. Did the *Sir Francis* fulfil that duty ? She did nothing except hail at the very last. Was there anything she could do ? If there was objection to her sounding her whistle on the ground that it might be mistaken for one of the authorized signals of a vessel under way there was no such objection to her ringing her bell. She did nothing because her look-out was deficient.

(1) " This order [with regard to the non-exhibition of lights] does not absolve the masters of craft at anchor from keeping a sharp look-out and giving warning on the approach of any craft under way."

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In such circumstances as those which existed an officer ought to have been on the bridge. The chief officer had left the bridge to call the second officer, who was late in turning out for his watch. It was left to the A.B. on the bridge to keep a look-out, and, what is more important, to decide whether the time had come to give any warning to an approaching vessel and to give the warning. The chief officer had just returned to the poop. But, as I have found, the hailing was at the very last. Before the collision several ships had passed down, but those on board the *Sir Francis* were aware of only one.

I hold the *Sir Francis* to blame for bad look-out and consequent failure to give warning of her presence to the *Purfleet Belle*. I hold that this fault was a cause contributing to the collision. I pronounce both vessels to blame and in equal degree.

Solicitor for plaintiffs : *C. E. Harvey.*

Solicitors for defendants : *Holman, Fenwick & Willan.*

E. C. T.

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Feb. 1, 2.

ADMIRALTY.

H.M.S. HYDRA.

[1917, fol. 540.]

Admiralty—Collision—Vessel navigating without Lights—Duty to exhibit Lights to approaching Vessel.

A vessel which, to avoid danger from enemy submarines, is navigating without lights under Admiralty directions is not bound to exhibit her under way lights to an approaching vessel at whatever distance that vessel is first seen ; but the lights must be exhibited in ample time to enable the other vessel to take action, if the duty of action lies on her, or to warn her of the presence of the hitherto unlighted vessel, if the duty of action lies on the latter.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steam ship *Nelly ;* the defendant was Lieutenant Colin S. Thomson, R.N., commander of His Majesty's torpedo-boat destroyer *Hydra.*

The action was heard in camera. The facts and arguments, so far as proper for publication, are stated in the judgment.

1918. Feb. 1. *Laing, K.C.*, and *D. Stephens*, for the plaintiffs. *Aspinall, K.C.*, and *C. R. Dunlop*, for the defendants.

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H.M.S. HYDRA.

Cur. adv. vult.

Feb. 2. HILL J. This is an action by the owners of the Danish steamship *Nelly* in respect of a collision between the *Nelly* and His Majesty's ship *Hydra*, which happened on the evening of February 11, 1917, in the English Channel. The *Nelly* is a steamship of 1514 tons gross and 250 feet long, and was laden. The night was dark, the weather clear, and there was practically no wind. The *Nelly* and the *Hydra* were on converging and crossing courses, which are correctly stated in the pleadings, the difference between the courses being almost exactly seven points, and the *Hydra* had the *Nelly* on her starboard side, and the *Nelly* had the *Hydra* on her port side. The speed of the *Hydra* was more than twice the speed of the *Nelly*. The *Nelly* was not carrying any lights exhibited. She had her side lights but not her masthead light lit and ready to be shown. The *Hydra* had her regulation lights exhibited.

The case made for the *Nelly* was that she saw, two to three miles distant and about two points before the beam, the masthead and green lights of the *Hydra;* that she kept course and speed; that after an interval, but still several minutes before the collision, she showed her red, the chief officer lifting up the lamp and holding it on the bridge rail; that when about five or six lengths away she sounded a warning signal of two short and one long blasts; and that at the last she went full speed astern and sounded three short blasts.

The case for the defendant is that the *Nelly's* red light was seen two to three points on the starboard bow at a time which Lieutenant Thomson says was three or four minutes before the collision; the light was watched, and finally, as no masthead light was seen, was judged to be the port light of a sailing ship; that as there was no wind it was rightly assumed to be safe to pass ahead of her, and the *Hydra*, accordingly, continued to keep her course and speed until, when close to, the *Nelly* was made out to be a steamer; that the helm was then put hard-a-starboard, two short blasts were sounded, and both engines were ordered full speed astern with the intention of turning away from the *Nelly* in a circle, but the collision happened

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before the engines were got working astern; that just before the collision an indistinguishable sound signal was heard from the *Nelly*.

The charges made against the *Hydra* were not keeping out of the way and attempting to pass ahead. The charges against the *Nelly* were failing to show the masthead light, showing the red light too late and in an improper manner, and reversing too late.

In the circumstances of the time and place the *Nelly* was justified in not carrying lights. If the red light, without the masthead light, was sufficient, I find that the *Nelly* showed the red light in ample time to enable the *Hydra* to take such action as would avoid collision. I think the *Nelly* was not bound to show the light sooner than that. It would go far to defeat the object for which lights are not carried exhibited if they have to be shown to an approaching ship at whatever distance she may be sighted. But they must be shown in ample time to enable the other ship to take action, if the duty of action lies on her, or to warn the other ship of the presence of the showing ship, if the duty of action lies on her.

I think the evidence of the *Nelly* exaggerates the distance at which the red light was shown, but it was shown in ample time to inform the *Hydra*—to give the *Hydra* time to act. I find the red light was displayed in a proper manner, so far as the *Hydra* was concerned. It mattered not to the *Hydra* whether the lamp was put in the screen or rested on the rail and held steadily, as I find it was, by the mate of the *Nelly*. I find that the *Nelly* reversed in proper time. It is true the master says that he reversed when the collision was inevitable. But the ships were crossing, and the *Nelly* was not entitled to reverse so long as the *Hydra*, unaided, could still avoid the collision; and, having regard to the speed of the *Hydra*, the time between the moment when the *Hydra* ceased to be able to avoid the collision by her own action alone and the moment when the collision became inevitable was so short that it is impossible to say that the *Nelly* negligently delayed her reversing.

The fault, if fault there were, of the *Nelly* was the failure to show the masthead light. In my opinion, whatever ought to be the view of the duty to-day, there was at the time and place of the collision nothing, either in the instructions which the *Nelly* had received or in any generally recognized rule of prudent conduct, to justify a steamship in not carrying her masthead as well as her side lights

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ready to be shown, and, if time permitted, after becoming aware of the other steamer, in not showing the masthead light as well as the side light. There was time for the *Nelly* to show her masthead light, but she had not it ready, and did not show it. I think this was a fault. But did it contribute as a cause to the collision? The red light was displayed, according to the plaintiffs' evidence, some five minutes before the collision, and according to Lieutenant Thomson, who gave his evidence with conspicuous fairness, some three or four minutes before the collision. And, as substantially the bearing of the *Nelly* did not change, it ought to have been obvious that the red light was the light of a vessel under way approaching the *Hydra's* course. If there was no wind, it ought to have been obvious that the approaching vessel must be a steamship; but, whether steamship or sailing vessel, it must be a vessel approaching the *Hydra's* course. Therefore it ought to have been obvious that it was the duty of the *Hydra* to give way and to pass under the stern of the vessel so approaching. All this ought to have been obvious long before the time when the hull of the *Nelly* was made out and action was taken, and long before that the *Hydra* ought to have taken steps to keep clear. Instead, nothing was done until it was impossible to do anything effective.

In my judgment the cause of this collision was the failure of Lieutenant Thomson to appreciate, as he ought to have done, that the *Nelly* was approaching on a crossing course, and his consequent failure to keep clear; and I find that the failure of the *Nelly* to show a masthead light was not a fault contributing as a cause to the collision. Notwithstanding that failure, the *Hydra*, with the indications she had, could, with ordinary care, have avoided the collision.

I therefore pronounce the *Hydra* alone to blame.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitor for defendants: *Treasury Solicitor.*

E. C. T.

1918
Jan. 17.

ADMIRALTY.

(In Prize.)

THE GLENROY.

[1917, No. 1683.]

Prize Court—Enemy Cargo—Discharge in Port of London—Sale—Subsequent Seizure of Proceeds as Prize—Condemnation of Proceeds.

The proceeds of enemy goods discharged in port, which would have been subject to seizure and condemnation had they remained in specie, are, when nothing has intervened to change their ownership, also subject to seizure and condemnation.

Application to condemn the proceeds of sale of enemy goods.

The Procurator-General, on behalf of the Crown, claimed the condemnation of the sum of 1829*l.* 6*s.* 2*d.*, the net proceeds of the sale of 2800 bags of sesamum or teel seed, shipped at Shanghai before the outbreak of war in the British steamship *Glenroy* by Schnabel Gaumer & Co., a German firm carrying on business in Germany and in China. All the partners were Germans and the offices of the firm in China were registered at the German Consulates. The seed was consigned to Rotterdam "to order." War broke out after the *Glenroy* sailed, and she was accordingly diverted to London, where she arrived on August 19, 1914. The seed was discharged and warehoused in the port, and, being unclaimed and of a perishable nature, the shipowners sold it and paid the gross proceeds, 2414*l.* 6*s.* 8*d.*, into their current account. In July, 1917, the Solicitor to the Treasury wrote to the ship's agents that it had been brought to the Procurator-General's notice that some of the cargoes of certain vessels, diverted from continental ports on the outbreak of war, had been found to be enemy property, and asked for particulars as to the *Glenroy's* cargo. The secretary of the Glen Line replied that the only charge they had to account for was the consignment of teel seed in question, and on August 1 sent their cheque to the Procurator-General for 1829*l.* 6*s.* 2*d.*, being the net proceeds of sale, less freight, sale charges, storage, &c. This cheque was

forwarded to the Admiralty Marshal and paid into the Prize Court for adjudication, and on September 26, 1917, a writ in prize was issued claiming condemnation of the proceeds of sale as droits of admiralty.

1918. Jan. 17. *Sir Gordon Hewart, S.-G.*, and *M. Shearman*, for the Procurator-General. On the arrival of the cargo in the Port of London the Crown would have had the right to seize these goods as enemy property laden on board a British vessel. The goods had not become the property of any one else, and they remained subject to seizure although converted into money which was paid into the shipowners' bank. The Court will follow the goods or their proceeds with its process: see Story's Principles and Practice of Prize Courts (Pratt's ed.), p. 28.

[THE PRESIDENT. Does not that passage refer to following the proceeds after capture ?]

That may be so, but, adopting the language of Lord Mansfield in *Lindo* v. *Rodney* (1), it would be "spinning very nicely" to say that the mere fact that the shipowners have chosen to hand over the proceeds of the goods when sold prevents the Court from dealing with the proceeds as it might have done with the goods themselves. The matter is dealt with to some extent in the judgment of the Privy Council in *The Roumanian* (2), where Lord Parker referred to all the authorities on the question of seizure of property on land. In *The Hoffnung* (3), there referred to, the cargo had been landed and sold prior to the declaration of war, and an attempt was made to recover the value of the goods from the neutral ship which had brought them to this country, the proceeds having been applied to the repair of the ship. The account had been closed before the seizure of the ship and there was therefore no proceeds which could be seized.

Naturally, therefore, the claim was rejected. This is a very different case. These proceeds were paid into the shipowners' bank for the benefit of whomsoever they might concern and represented enemy goods landed after the outbreak of war which would have been subject to seizure at any time.

(1) (1782) 2 Doug. 612, n. (2) [1916] 1 A. C. 124, 130.
(3) (1807) 6 C. Rob. 383.

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THE GLENROY.

THE PRESIDENT (SIR SAMUEL EVANS). It is clear upon the facts that the 2800 bags of sesamum seed belonged to the enemy, and they were laden on a British ship and entered a British port, namely, the Port of London, the ship having been diverted to that port after the commencement of the war. Acting according to their rights as shipowners—and I daresay for good reasons otherwise because of the character of the goods—the shipowners sold them, and they realized the sum of 1829*l.* 6*s.* 2*d.* as the net proceeds. While the goods were at sea, and while they remained in port, they were subject to capture or seizure by the Crown. There is no evidence before me that they went further afield than the Port of London. They were there sold. Thereupon they became converted into money, and that money was in the hands of the shipowners. Somehow it came to the knowledge of the Procurator-General that there was that sum left in the custody of the shipowners, and a demand was made by the Procurator-General which was equivalent to a seizure of the proceeds, if there was a right of seizure. The goods were converted into money in the port, and as they had been subject to seizure and condemnation when they remained in specie, their proceeds—nothing else having intervened to change their ownership—are also subject to condemnation. I therefore condemn in favour of the Crown the sum of 1829*l.* 6*s.* 2*d.*, representing the net proceeds of the goods as good and lawful prize.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

DIVORCE.

1918
Jan. 23, 24, 25, 26; *Feb.* 1.

DAVIS *v.* DAVIS.

Divorce—Restitution of Conjugal Rights—Defence to Wife's Suit for Restitution—Refusal of Marital Intercourse—Discretion of Court.

The rights of husband and wife as to marital intercourse are mutual, and either party refusing such intercourse without sufficient reason gives just cause to the other for withdrawal from cohabitation. The Court will therefore, in its discretion, regard such a refusal as a valid defence to a wife's petition for restitution of conjugal rights.

The dicta of Sir F. Jeune and Lord Hannen in the divorce cases of *Synge* v. *Synge* [1900] P. 180 and *Ousey* v. *Ousey and Atkinson* (1874) L. R. 3 P. & M. 223 adopted and applied to the case of a petition for restitution of conjugal rights.

This was a wife's petition for restitution of conjugal rights. The husband put in an answer alleging that his wife had been guilty of such conduct as to disentitle her to a decree for restitution. The points complained of were refusal to allow marital intercourse and indecent conduct with other men, giving rise to suspicion of adultery.

He also alleged that shortly before the commencement of the proceedings he and his wife had entered into and signed an agreement for a separation, and they had since lived separate and apart according to the terms of the agreement, and he had in pursuance of the agreement transferred to his wife certain shares, and had paid, and was still paying her, an allowance of 250*l.* a year. The agreement did not contain any clause that the parties would not take proceedings for restitution; and it was admitted at the hearing that the wife had refused to execute a deed, prepared for carrying out the agreement, which did contain such a covenant, and therefore the agreement was not relied on as a complete defence.

Hume-Williams, K.C., and *H. Clifford Mortimer*, for the petitioner. We do not deny that the Court has a discretion to withhold a decree for restitution from a complaining wife, but the Court will exercise such a discretion only if her husband had grave and weighty cause

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for living separate: *Oldroyd* v. *Oldroyd* (1); *Greene* v. *Greene* (2). No such cause is shown here.

Colam, K.C., and *Tyndale*, for the respondent. It is true that in *Greene* v. *Greene* (2) Shearman J. held that the wife's conduct in writing certain letters was not a reasonable excuse for the husband's refusal to cohabit, but in this case the facts proved point to conduct on the wife's part of a more serious description.

Haswell v. *Haswell and Sanderson* (3) shows what conduct on the part of the wife may induce the Court to say that her husband has not separated from her without a reasonable excuse. And the judgments in that case may, since the decision of *Russell* v. *Russell* (4) be taken as laying down the principles on which the Court will exercise the discretion which it now has to refuse a decree in restitution cases. In the present case this state of things exists quite apart from the refusal of intercourse, which in itself justifies the husband.

LORD COLERIDGE J. In this case the petitioner seeks from this Court a decree for the restitution of conjugal rights, on the ground that her husband has deserted her, that is to say, that he has refused conjugal rights to her.

There is a general rule about two years' absence, but, quite short of that, if at any time the husband can be proved to have refused to cohabit and to have withdrawn himself from his wife without lawful excuse, the wife is entitled to a decree for restitution of conjugal rights. But those rights are mutual.

What does that imply? I adopt the language of Sir F. Jeune in *Synge* v. *Synge* (5), in which case he quotes from Lord Hannen's judgment in *Ousey* v. *Ousey and Atkinson*. (6) Lord Hannen said: "I think that a husband taking the view that the fault was not with himself but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and therefore, leaving her, cannot be said to have been guilty of such desertion

(1) [1896] P. 175.
(2) [1916] P. 188.
(3) (1859) 1 Sw. & Tr. 502.
(4) [1895] P. 315.
(5) [1900] P. 180, 194.
(6) L. R. 3 P. & M. 223, 225.

as is contemplated by the statute." Sir F. Jeune went on to say: "I read these words in a large sense. I do not think it can reasonably be contended that if a wife permitted to her husband one act of intercourse and no more, that the connection between them would be more tolerable and more likely to lead to happiness and not to misery than if she refused intercourse altogether." Later on he makes use of this language, which ought to be written in letters of gold over the doors of all houses where husband and wife have to make allowances for each other (1): "The objects of married life, as expressed in the Marriage Service, are not the less true because they are the utterances of a more plain-spoken age than the present; and while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it."

Taking these decisions and that language as applicable to all cases in this Court, it is quite clear to me that any husband or wife who seeks a decree for restitution of conjugal rights must show that, those rights being mutual, he or she is willing to perform his or her part of the conjugal community, and that in a reasonable sense. There may be good grounds for partial cessation of intercourse in which the withdrawal of the husband or the wife would be a reasonable withdrawal. To justify separation there must be some deliberate, determined refusal such as to put an end to the idea of conjugal rights existing between the parties.

In this case the wife cannot maintain any charge of a matrimonial offence against the husband. I am confined, therefore, to the conditions which the law imposes as far as they affect the wife; that is to say, that if the husband has reasonable cause for withdrawal from the wife owing to conduct on her part such as would make it impossible for them to live together properly, that is a ground for refusing as against him a decree for restitution of conjugal rights, though the conduct imputed to the wife falls short of any matrimonial offence. [The learned judge then proceeded to deal with the evidence, expressed his conclusion that the allegations

(1) [1900] P. 195.

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of the husband were in substance established, and continued :] I am not asked to say in this case that the abortive negotiations for a separation deed amount to an estoppel, and prevent the petitioner from succeeding in her petition; but they form an element in my decision whether I should in my discretion restore to her the rights to which she says she is entitled. The document was acted upon; certain shares agreed to be transferred to the wife were transferred and are still held; the 250*l.* a year agreed to be paid by the husband was paid and is still paid; and there is no supposition that the husband seeks to withdraw from that arrangement if the petition against him fails; nor do I think he could do so.

Under these circumstances the appeal made to me that if I decide one way I leave the petitioner destitute, helpless, and so forth, is rather exaggerated.

I have to make up my mind on the whole of this case whether or not, having regard to the facts I have set forth, the respondent had or had not reasonable grounds for opposing this petition. I consider that he had such reasonable grounds, and therefore I must dismiss the petition.

Solicitors for petitioner: *Hyman Isaacs, Lewis & Mills.*
Solicitors for respondent: *Herbert Oppenheimer & Nathan.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.
1917
Dec. 3, 4, 5, 20.

CASDAGLI *v.* CASDAGLI.

Divorce—Jurisdiction—Foreign Domicil—British protected Subject—Residence in Egypt—Extra-territoriality.

Residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice.

In answer to his wife's petition for a divorce the husband by an act on petition alleged that the spouses were domiciled in the British Protectorate of Egypt, and that the English Court had no jurisdiction to dissolve the marriage. The husband was born in England in 1872, his father being a British subject of Russian parentage. Since 1895 he had resided permanently in Egypt. The wife was born in Egypt and had always been, and still was, domiciled there. The marriage took place at Alexandria, and the matrimonial home had always been in Egypt. The Ottoman Order in Council of 1910 which provides for the constitution and powers of His Britannic Majesty's Courts for the dominions of the Sublime Porte, excepts from the jurisdiction in matrimonial causes conferred on those Courts the jurisdiction relative to dissolution or nullity or jactitation of marriage. The husband's name was inscribed on the register of British subjects resident in Egypt to whom certain privileges were conceded by treaty. Persons so registered were amenable only to the jurisdiction of the British consular Courts in matters civil and criminal, enjoyed immunity from territorial rule and taxation, and constituted a privileged society living under English law on Egyptian soil and independent of Egyptian Courts and tax-gatherers. Egypt became a British Protectorate in 1914, and by a decree of the Sultan of Egypt dated February 5, 1915, the then existing exceptional jurisdictions were continued :—

Held (Scrutton L.J. dissenting), that the husband had not acquired a new Egyptian domicil of choice, that his domicil of origin remained, and that the English Court had jurisdiction to entertain the wife's suit for dissolution.

The decision in *In re Tootal's Trusts* (1883) 23 Ch. D. 532 and the dicta in *Abd-ul-Messih* v. *Farra* (1888) 13 App. Cas. 431 approved and followed.

Decision of Horridge J. affirmed.

APPEAL from a decision of Horridge J.

Jeanne Casdagli on March 4, 1916, presented a petition praying for a dissolution of her marriage with Demetrius Emmanuel Casdagli.

C. A. 1917

CASDAGLI v. CASDAGLI.

Demetrius Emmanuel Casdagli, by an act on petition dated July 20, 1916, contended that the English Court had no jurisdiction to entertain a suit for dissolution of the marriage, on the ground that he was not domiciled in England and had never had a matrimonial home or residence in England. By her answer, filed on October 9, 1916, the petitioner contended that the respondent had never abandoned his English domicil.

On the hearing of the act on petition before Horridge J. it was argued on behalf of the wife (1.) that there was no sufficient evidence to establish an Egyptian domicil; (2.) that the fact that by the Ottoman Order in Council, 1910, par. 103, jurisdiction to dissolve marriage was expressly excepted from the jurisdiction of the consular Court, to which British subjects are amenable, impliedly gave jurisdiction to the English Court; and (3.) that residence in Egypt by the husband, who was admitted to be a privileged member of an extra-territorial community, was ineffectual to create a new Egyptian domicil of choice.

Before 1914 the position of foreigners in Turkey and Egypt was regulated by the Capitulations between Great Britain and the Ottoman Empire, which were confirmed by the Treaty of the Dardanelles in 1809. (1) Art. 16 of the Capitulations provided "That if there happen any suit, or other difference or dispute, amongst the English themselves, the decision thereof shall be left to their own Ambassador or Consul, according to their custom, without the judge or other governors our slaves intermeddling therein."

By the Ottoman Order in Council of November 7, 1910, after reciting that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, His Majesty the King has jurisdiction within the dominions of the Sublime Ottoman Porte," it was by virtue and exercise of the powers conferred by the Foreign Jurisdiction Act, 1890, ordered (art. 8) that there should be a Court, styled "His Britannic Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte," consisting of judges appointed by His Majesty. By art. 103, "The Supreme Court shall, as far as circumstances admit, have for and within the Ottoman dominions, with respect to British subjects, all such jurisdiction in matrimonial causes, except

(1) See Hertslet's Collection of Treaties and Conventions, vol. 2 (1827), p. 350.

the jurisdiction relative to dissolution or nullity or jactitation of marriage, as for the time being belongs to the High Court in England."

In December, 1914, Egypt was freed from the suzerainty of Turkey and became an independent State subject to British protection. By a decree of the Sultan of Egypt dated February 9, 1915, the exceptional jurisdictions up to that time recognized in Egypt were continued in the enjoyment of the privileges which they had at the time of the cessation of the Ottoman sovereignty, and by the Egypt Order in Council of February 16, 1915, all Orders in Council formerly in force in Egypt were continued.

The facts as found by Horridge J. were as follows: The husband was a British subject born in England of Russian parentage on October 10, 1872. He first went to Egypt in 1879 with his father and mother on account of his health and returned to England in 1882. He was educated in England and France and returned to Egypt to settle in 1895. When in England he was continually troubled with bronchitis and asthma, and his parents thought the climate of Egypt would be more suitable for his health, and decided that he should make Egypt his home and attend to the family interests in Egypt. From 1895 to about the end of 1900 he resided in Alexandria with an uncle. He was registered at the British Consulate as a British-born subject on May 20, 1895.

Whilst in Alexandria he was employed in his father's business there, which was that of an importer of Manchester goods, and was managed by his uncle. From 1900 till the present time he had resided at Cairo in connection with the business previously carried on by his father. From 1904 to 1917, as appeared from a consular certificate dated February 28, 1917, he was registered as a British subject eligible to be an assessor in the Mixed Tribunals. He had never left Egypt except on one occasion during the Balkan war and except for the purpose of taking a holiday in the hot weather. In addition to attending to his business connected with the Manchester trade he founded in Cairo, in partnership with a Mr. Argyris, a private commercial bank, and continued a partner therein until March 9, 1905. In 1910 he was taken into partnership by his father with four other brothers. The business of the partnership had its head office in Egypt with a branch office in Manchester,

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and he was described in the articles as a British merchant. The business had been carried on since that date, although the firm had consisted from time to time of different partners, and at the present time the respondent and his brother Alexander were known as the "Egyptian Brothers," and they attended to the Egyptian portion of the business, while his brothers Theodore and Xenophon were known as the "English Brothers," and attended to the Manchester business. The respondent resided with his parents from 1901 until his marriage in 1905 by the Great Patriarch of Alexandria, and the husband and wife lived with his parents in Egypt until the death of his father in 1911, since which time they had usually been in sole occupation of the house, although under his father's will his mother had the use of the house for life. On September 29, 1910, he made his will, in which he stated that he was "a merchant, a British-born subject having a domicil in Egypt." On the evidence Horridge J. was of opinion that the husband had, apart from any question of extra-territorial rights, voluntarily fixed his chief or sole residence in Egypt with an intention to reside there for an unlimited time.

Upon the question whether the possession by the husband of extra-territorial rights rendered him incapable of acquiring an Egyptian domicil, Horridge J. said that, if the case had been free from authority, he would have felt that there was great force in the views expressed by certain jurists, and in the American case of *Mather* v. *Cunningham* (1), on the matters dealt with in *In re Tootal's Trusts* (2), and he might have come to a conclusion which, having regard to the latter case and *Abd-ul-Messih* v. *Farra* (3), would have been wrong. But as the decision in *In re Tootal's Trusts* (2), which affected personal status, was given in 1883, and had been supported by the great authority of the judgment of Lord Watson in the Privy Council in *Abd-ul-Messih* v. *Farra* (3), he thought he was bound by those cases to hold that the act on petition failed.

The husband appealed.

George Wallace, K.C., and *J. Harvey Murphy*, for the appellant. The question is whether there is any rule of law which prevents a

(1) (1909) 105 Maine Rep. 326; 74 Atlantic Reporter, 809.

(2) 23 Ch. D. 532.

(3) 13 App. Cas. 431.

person, who both resides and intends to reside permanently in a foreign country, where, by treaty between his own country and that foreign country, he is subject in some respects to extra-territorial jurisdiction, from acquiring a domicil of choice there. It is said that this question is decided in the affirmative by *In re Tootal's Trusts* (1) and *Abd-ul-Messih* v. *Farra* (2), where the position of an Englishman in Egypt is described : see also *Maltass* v. *Maltass.* (3) It is submitted that the Capitulations have not the effect of excluding altogether the Turkish jurisdiction over persons resident in the dominions, so as to render an Egyptian domicil impossible to a member of an extra-territorial community. The position under the Capitulations is that special tribunals have been permitted by the Sultan to deal with such members of the community as have extra-territorial rights ; and in those tribunals the law of the nationality is applied : see Young's Corps de Droit Ottoman, vol. 1, p. 52 ; and Scott's Law affecting Foreigners in Egypt as the Result of the Capitulations. *In re Tootal's Trusts* (1) has been much criticized by writers on international law : see Westlake's Private International Law, 5th ed., p. 337 ; Piggott on Ex-territoriality, p. 216b ; Dicey on the Conflict of Laws, 2nd ed., p. 724 n. It is submitted that *In re Tootal's Trusts* (1) is not good law. It is true that Lord Watson in *Abd-ul-Messih* v. *Farra* (4) said that " residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice " ; but that dictum cannot be supported. At any rate it is not binding on this Court : *Leask* v. *Scott.* (5) The contrary opinion was expressed by the American Courts in *Mather* v. *Cunningham.* (6) It is submitted that residence in fact and intention to reside permanently are sufficient to create a domicil of choice.

The law of the domicil is that which is allowed by the sovereign power of that country to be administered. It matters not whether the territorial sovereign administers that law directly or through the intervention of another sovereign who is allowed by him to set up

(1) 23 Ch. D. 532.
(2) 13 App. Cas. 431.
(3) (1844) 1 Rob. Ecc. 67.
(4) 13 App. Cas. 445.
(5) (1877) 2 Q. B. D. 376, 380.
(6) 105 Maine Rep. 326 ; 74 Atlantic Reporter, 809.

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Courts in the territory of the domicil for the administration of such law as he pleases. Cases on commercial domicil, such as *The Indian Chief* (1), have no bearing on the point in the present case. Different considerations arise in them. The same remark applies to *Hodgson* v. *De Beauchesne* (2), where Dr. Lushington said: "Various meanings have been affixed to the word 'domicile': domicile, jure gentium, domicile by the Municipal law of any country, and, we may add, domicile during war, as it may govern rights of belligerent States. This species of domicile is, it is true, in one sense a domicile, jure gentium, but in many particulars it is governed by very different considerations, and decisions belonging to it must be applied with great caution to questions of domicile independent of war."

Englishmen in Egypt are subject to the jurisdiction of the Mixed Tribunals, Courts established by the Khedive in 1875, and also in some respects to that of the Egyptian local Courts. The consular Courts in Egypt are constituted by permission of the Egyptian sovereign. They are therefore to that extent Egyptian Courts: *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (3); *Imperial Japanese Government* v. *P. & O. Steam Navigation Co.* (4) The law applicable under the Capitulations is the law of the territorial sovereign, that is, the Egyptian law: *Bank of Africa* v. *Cohen* (5); *Mighell* v. *Sultan of Johore* (6); *Sayad Muhammad Yusuf-ud-Din* v. *Reg.* (7) The English Courts have no jurisdiction over any person domiciled in Egypt. When the question of divorce arises the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage: *Bater* v. *Bater* (8); *Le Mesurier* v. *Le Mesurier.* (9) The test of domicil is residence and intention to reside for an indefinite period. Residence in a country attracts the local law: *Udny* v. *Udny* (10); *Bell* v. *Kennedy.* (11)

The effect of the decision in *In re Tootal's Trusts* (12) entails great

(1) (1801) 3 C. Rob. 12, 28.
(2) (1858) 12 Moo. P. C. 285, 313.
(3) [1901] A. C. 373, 385.
(4) [1895] A. C. 644.
(5) [1909] 2 Ch. 129.
(6) [1894] 1 Q. B. 149.
(7) (1897) 76 L. T. 813.
(8) [1906] P. 209.
(9) [1895] A. C. 517.
(10) (1869) L. R. 1 H. L. Sc. 441.
(11) (1868) L. R. 1 H. L. Sc. 307.
(12) 13 App. Cas. 431.

inconvenience upon British communities abroad: *The Derfflinger* (*No.* 1). (1)

There is no principle or rule of convenience against an Englishman becoming completely domiciled in Egypt, and therefore not amenable to the jurisdiction of this country. [*Jopp* v. *Wood* (2); *Cockrell* v. *Cockrell* (3); Pitt Cobbett's Leading Cases in International Law; Westlake's Private International Law, 5th ed., pp. 341-8; and Piggott on Ex-territoriality, p. 216b, were also referred to.] At all events, the appellant acquired an Egyptian domicil during the interval between December 18, 1914, when the Ottoman suzerainty over Egypt ceased, and February 16, 1915, when the authority of the Khedive was established under the English protectorate.

Hume Williams, K.C., and *Patrick Hastings*, for the respondent. The judgment of Horridge J. is right. A person cannot acquire a new domicil of choice in a country to which he voluntarily goes, and where, as the result of existing treaty, he is unable to acquire the privileges of citizenship. He may destroy his former domicil of choice, but cannot acquire a new one so as to get rid of his domicil of origin: *Marchioness of Huntly* v. *Gaskell*. (4) That case shows that to destroy the domicil of origin there must be an intention not only to reside permanently in the new country, but to relinquish all the rights, privileges, and immunities of the country of his original domicil. The appellant has not shown any such intention. On the contrary, he has exercised in Egypt every privilege which a British subject has there. He has asserted his nationality and taken the benefit of every privilege given to him by his domicil of origin. He went to Egypt knowing that his status there was regulated by treaty, the effect of which was that he was amenable not to the local law, but to that of a Court by which the law of England is administered. He has thus obtained by virtue of a treaty made with his Sovereign complete immunity from process in the territorial Courts. By that treaty the sovereign territorial power, in derogation of its sovereign rights, has granted certain privileges and immunities the benefit of which has been taken by the appellant as a member of a privileged

(1) (1916) 1 Br. & Col. P. C. 386, 388, 389.

(2) (1865) 4 D. J. & S. 616.

(3) (1856) 25 L. J. (Ch.) 730; 2 Jur. (N.S.) 727.

(4) [1906] A. C. 56.

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community: *Imperial Japanese Government* v. *P. & O. Steam Navigation Co.* (1) Under such circumstances residence and intention to reside are not enough to establish an intention to acquire a new domicil of choice and abandon the domicil of origin.

A community of the description alluded to by Lord Watson in *Abd-ul-Messih* v. *Farra* (2) as applying to residents in Egypt is for all purposes of domicil to be regarded as an ex-territorial colony of the Crown, and, as Lord Watson says, "The idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books." Residence in a foreign country, without subjection to its municipal laws and customs, is ineffectual to create a new domicil.

By the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), the British Sovereign can exercise any jurisdiction which His Majesty may have within a foreign country in as ample a manner as if His Majesty has acquired that jurisdiction by the cession or conquest of territory, and by sect. 3 "every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be valid as if it had been done according to the local law then in force in that country." If, as is contended for the appellant, the law administered by the consular Courts is the local law, why should that section have been enacted? Under the Ottoman Order in Council of November 7, 1910, persons affected by it were relegated to the tribunals of their own domicil in respect of matters affecting status which the Courts thereby constituted had no power to deal with.

In re Tootal's Trusts (3) was decided in 1883 and was followed in 1888 by the Privy Council in *Abd-ul-Messih* v. *Farra*. (4) Since that time it has been consistently acted on: *The Derfflinger* (*No.* 1) (5); *The Lutzow*. (6) It is adopted in Dicey on the Conflict of Laws, 2nd ed., p. 724. It is said that the decision has been adversely criticized by text-writers. Those criticisms are without weight because they lose sight of all the incidents of domicil. When a decision affecting either the contractual or personal rights of individuals has been acted upon for a substantial period the Court will not without very

(1) [1895] A. C. 644.
(2) 13 App. Cas. 439.
(3) 23 Ch. D. 532.
(4) 13 App. Cas. 431.
(5) 1 Br. & Col. P. C. 386.
(6) (1915) 1 Br. & Col. P. C. 528.

cogent reason overrule it: *Cooper* v. *Griffin*. (1) It is not shown that the appellant in fact acquired a new domicil in Egypt during the interval between the abolition of the Turkish suzerainty and the establishment of the British protectorate.

George Wallace, K.C., in reply.

1917. Dec. 20. SWINFEN EADY L.J. (after stating the facts). Under these circumstances the appellant contends that he has acquired a domicil of choice in Egypt. The Ottoman Order in Council of November 7, 1910, which provides for the constitution and powers of His Britannic Majesty's Courts for the Dominions of the Sublime Ottoman Porte, by art. 103 excepts from the jurisdiction in matrimonial causes conferred on those Courts the jurisdiction relative to dissolution or nullity or jactitation of marriage. These Courts cannot, therefore, entertain the petitioner's suit, and, if the contention of the appellant is well founded, there is not any Court which can do so. The question thus arises whether the appellant, by residing in Egypt under the circumstances I have mentioned, has acquired a new domicil of choice there.

In *Bell* v. *Kennedy* (2) Lord Westbury stated that domicil is not mere residence, and said: "It is the relation which the law creates between an individual and a particular locality or country." It is not suggested by the appellant that his residence in Egypt has created any relation whatever between himself and the locality; on the contrary, by reason of his membership of a privileged society, he enjoyed immunity from territorial rule and taxation. The position of persons resident in Egypt under British protection is thus described by Lord Watson in *Abd-ul-Messih* v. *Farra* (3): "Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our consular Courts in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law, on Egyptian soil, and independent of Egyptian Courts and tax-gatherers." The contention which was

(1) [1892] 1 Q. B. 740. (2) L. R. 1 H. L. Sc. 320.
(3) 13 App. Cas. 439.

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raised in that case, and which failed, was that such a community ought for all purposes of domicil to be regarded as an ex-territorial colony of the Crown, and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, and accordingly it was argued that the deceased had acquired an English or, as it was termed, an Anglo-Egyptian, domicil. It was, however, held that there is no such thing known to the law as domicil arising from society and not from connection with a locality. The judgment of Chitty J. in *In re Tootal's Trusts* (1) to the same effect was approved. It was also argued in *Abd-ul-Messih* v. *Farra* (2) that the testator, by his residence in Cairo, having attained the status of a protected British subject, had at least acquired an Egyptian as distinguished from a Turkish domicil, which was his domicil of origin; but this was decided in the negative, Lord Watson stating (3) "that residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice." It is precisely such residence which the present appellant contends has enabled him to acquire a domicil in the British Protectorate of Egypt.

Lord Westbury, speaking of the acquisision of a residential domicil, said in *Udny* v. *Udny* (4): "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." With reference to this passage, Lord Watson said in *Abd-ul-Messih* v. *Farra* (2): "According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing power in whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil."

No question is raised on this appeal with regard to the domicil

(1) 23 Ch. D. 532.
(2) 13 App. Cas. 439.
(3) 13 App. Cas. 445.
(4) L. R. 1 H. L. Sc. 441, 458.

of a person who voluntarily fixes his place of residence in a foreign country, whether Christian or not, intending to make it his permanent home, intending to make himself a member of the civil society of that country, and manifesting this intention by adopting its manner of life, and identifying himself with its customs—not living in a community separate and apart, but merging in the general life of the native inhabitants. The appellant has done nothing of the kind here, but has always been careful to preserve his status and position as a member of a privileged community, living separate and apart from the native inhabitants of Egypt.

The appellant was unable to produce any British authority in support of his contention that he had acquired a domicil in Egypt, but he relied on a case of *Mather* v. *Cunningham* (1), decided by the Supreme Judicial Court of Maine, U.S.A., in 1909. In that case a native of Waldo county in Maine settled in Shanghai, a place where by treaty American law is substituted for the Chinese local laws. He died there having left a will which was proved in the American consular Court there, which administered the common law of the United States. By the law of Maine, the deceased's domicil of origin, the will was invalid. It was contended that as a member of an ex-territorial community the deceased could not acquire a Chinese domicil, but it was held that the domicil of a person living in a country that has granted ex-territorial privileges should be determined by the same rules of law that apply to the acquisition of domicil in other countries, and that the deceased had therefore acquired a Chinese domicil. This case is not consistent with the view of domicil adopted and acted upon by English Courts. A person settling in a country where ex-territorial privileges are granted, and who is governed by the law of his domicil of origin, cannot be said to have attracted to himself the local municipal law when the local law is by treaty expressly excluded from applying to him. It is not by reason of any local law that a British protected person in Egypt is to be immune from local law, and that his own law is to be applied to him by His Britannic Majesty's Courts sitting in Egypt on Egyptian soil, but deriving their authority from His Majesty; such jurisdiction is, indeed, in derogation of the power of the sovereign of the country conferring such rights: see

(1) 105 Maine Rep. 326; 74 Atlantic Reporter, 809.

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Imperial Japanese Government v. *P. & O. Steam Navigation Co.* (1); and the law administered in Egypt by His Britannic Majesty's Courts is English law, and not Egyptian local law. The case of *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (2) is to the same effect. It was there pointed out that Zanzibar was and remained foreign territory; that the authority derived by Her Majesty the Queen from the Sultan of Zanzibar conferred upon her a limited sovereign power, and it was by virtue of this power that her Courts deriving authority from her sitting in Zanzibar administered English law, which, in matters affecting the incidents of land, adopted the lex loci rei sitae, which was in that case Mahomedan law.

The effect of the Foreign Jurisdiction Act, 1890, is to enable the British Sovereign to exercise any jurisdiction which His Majesty may have within a foreign country in as ample a manner as if His Majesty had acquired that jurisdiction by the cession or conquest of territory; and by s. 3 of that Act it is provided that "every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law in force in that country." Thus, although not done according to local law, which is excluded by the treaty, it is to be as valid as if it had been so done. I am of opinion that the Ottoman Order in Council of November 7, 1910, contemplated that persons should be relegated to the tribunals of their own domicil in respect of those matters affecting status which the Courts thereby constituted were not empowered to deal with—if an Englishman, to an English Court; if a Scotsman, to a Scottish Court, and so on—and certainly never contemplated that a new domicil could be acquired in Egypt, the effect of which would be to leave the excluded matters wholly unprovided for. A further point was raised by counsel for the appellant, who contended that in the interval between December 18, 1914, when the suzerainty of Turkey over Egypt was terminated and the British protectorate constituted, and February 16, 1915, the date of the Egypt Order in Council applying the Ottoman Order of 1910 to the territories of the Sultan of Egypt, the appellant was able to and did clothe himself with an Egyptian domicli. He contended that during this period there were not any ex-terri-

(1) [1895] A. C. 656. (2) [1901] A. C. 373.

torial rights, and therefore that the appellant could and did gain a domicil during this intermediate period. It is a sufficient answer to say that during this short interval there is not any evidence of anything done by the appellant, or of any declaration of intention, upon which such a contention can be supported. Moreover, during this interval all matters proceeded as if the Order of November 7, 1910, remained in force and the acts done ad interim were validated by the new Order in Council. The result is that in my judgment the order of Horridge J., which decided that the appellant had failed to prove an Egyptian domicil, was right, and this appeal fails and should be dismissed with costs.

WARRINGTON L.J. The petitioner, the wife, seeks for the dissolution of her marriage with the respondent, the present appellant. The appellant has filed an act on petition alleging that at the time of the institution of the suit his domicil was not English and the Court accordingly has no jurisdiction to dissolve his marriage, and praying that the petition may be dismissed on this ground. Horridge J. has refused the prayer of the act on petition, being of opinion that the appellant's domicil was English. The appellant appeals. He is a British subject. His domicil of origin is English. On the facts it is conceded that if it were a question of the acquisition by him of a domicil of choice in a country in which there are no special provisions exempting British subjects from the jurisdiction of the local Courts such a domicil would have been acquired; but it is contended by the petitioner, and has been decided on authority by Horridge J., that a domicil of choice would not, as the result of the same circumstances, be acquired by a British subject in a country such as Egypt, in which the British community has an extra-territorial character and its members are not subject to the jurisdiction of the Egyptian Courts and enjoy no civil status regulated by the law of Egypt.

The main authority for the judgment appealed from is *In re Tootal's Trusts* (1), and we are in terms invited to overrule the decision in that case.

Domicil in its legal meaning is clearly something more than the mere fact of physical residence coupled with the animus manendi. It

(1) 23 Ch. D. 532.

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connotes also a legal relation to the laws of the country of residence by which questions relating to the personal status of the individual are determined. It is thus described by Lord Westbury in *Bell* v. *Kennedy* (1): "Domicile therefore is an idea of law. It is the relation which the law creates between an individual and a particular locality or country." The relation may, of course, have varying incidents, according as the individual belongs to a particular class, determined by race, religion, or another factor, provided the law of the locality admits of such variation. An example of this is to be found in *Abd-ul-Messih* v. *Farra.* (2) The individual in that case was held to be domiciled in the Ottoman Empire and the succession to his movables to be regulated by those laws of the Ottoman Empire which governed the succession of the class of persons known as Chaldean Christians, to which class he belonged. But suppose the individual is so far exempt from the law of the locality or country that his civil status is unaffected thereby, is there then that relation between the individual and that locality or country which is the essence of the legal idea of domicil? I cannot think that there is, and for this reason I am of opinion that residence in such a country would not result in the acquisition of a domicil there. In arriving at this conclusion I do not consider that I am advancing anything contrary to the views expressed in the cases cited to us, or to the argument of Professor Westlake in Private International Law, 5th ed., pp. 335 and following. Indeed, what I have said is in accordance with what appears to have been the view of Chitty J. in *In re Tootal's Trusts* (3), where he expressed his approval of the admission by counsel that the deceased in that case had not acquired a Chinese domicil. I also desire to say that I leave entirely open any question which may arise on special facts, such as the complete identification of a person's mode of life with that of the native inhabitants of the country in religion, social customs, and so forth, and his segregation from the European community. There are none of such facts here.

But so far I have dealt with the matter as if the British subject in the dominions of the Ottoman Empire were merely exempt from the Turkish law as regards his civil status, the fact being that

(1) L. R. 1 H. L. Sc. 320. (2) 13 App. Cas. 431.
(3) 23 Ch. D. 532.

under the Order in Council establishing the consular Courts there he is made subject to the jurisdiction of those Courts, which is to be exercised on the principles of, and in accordance with, the English law for the time being in force. His civil status, therefore, is determined by English law.

It is contended that under those circumstances the British subject can acquire a domicil in Egypt which may be regarded in one of two ways—namely, either (1.) as an ordinary Egyptian domicil, the legal relation between the individual and the country being determined by English law administered by special Courts established under the authority of the local Government, exactly as in the *Abd-ul-Messih Case* (1) the person in question had a Turkish domicil involving the determination of his succession in accordance with the peculiar Turkish law relating to persons of his religion; or (2.) a peculiar form of domicil involving a legal relation not to the country in which he resides but to the community to which he by nationality belongs.

That it is impossible to acquire a domicil involving a legal relation not with a locality or country but with a community existing therein, and living under a jurisdiction administering a law foreign to the locality or country, is determined by the judgment in *In re Tootal's Trusts* (2), approved by the Privy Council in *Abd-ul-Messih* v. *Farra* (3), and was not in fact disputed by counsel for the appellant.

It remains to consider the first of the two modes of regarding the matter suggested as a justification for the alleged acquisition of an Egyptian domicil. This involves the proposition that the Courts established under the Order in Council are in reality Egyptian Courts, and that the law administered therein is really a branch of Egyptian law which, and not the law of the domicil of origin, determines the civil status.

With all respect to the American judges who in *Mather* v. *Cunningham* (4)—decided in the Supreme Court of the State of Maine—expressed a contrary view, I am of opinion that the consular Court in Egypt is one of the King's Courts, that its jurisdiction is derived

(1) 13 App. Cas. 431.
(2) 23 Ch. D. 532.
(3) 13 App. Cas. 439.
(4) 105 Maine Rep. 326; 74 Atlantic Reporter, 809.

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from the King and not from the ruler of Egypt, and that the law administered therein is strictly the law of England, and is not to be regarded as a branch of the law of Egypt.

It seems to me that the Ottoman Order in Council of November 7, 1910, correctly states the facts when it recites that by treaty, capitulation, grant, usage, sufferance, and other lawful means the King "has jurisdiction within the dominions of the Sublime Ottoman Porte." The action of the Turkish Sovereign seems to me to have been completed when he sanctioned the 16th of the Capitulations (1) which is in these terms: "That if there happen any suit or other difference or dispute, amongst the English themselves, the decision thereof shall be left to their own Ambassador or Consul, according to their custom, without the judge or other governors our slaves intermeddling therein." The importance of this is in the concluding words exempting the English from the Turkish jurisdiction; this left them under the jurisdiction of their own Sovereign, and it is as his representatives that his Ambassadors and Consuls and the consular Courts exercise their jurisdiction. This is, apparently, the view of the matter taken in the Foreign Jurisdiction Act, 1890, which provides by s. 1 that "It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction . . . . within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." It is also pointed out by the Privy Council in *Imperial Japanese Government* v. *P. & O. Steam Navigation Co.* (2) that the jurisdiction granted to the consular Courts under treaties such as those with Turkey is in derogation of the sovereign power of the treaty-making country. If in that case the consular Court in Japan could have been properly regarded as a Japanese Court acting under the authority of the Sovereign of Japan, the Judicial Committee might well have held that as such it could have entertained a counterclaim against a Japanese subject contrary to its actual decision.

It has been contended that the view I have expressed on the point now in question is in conflict with a passage in the judgment of the Privy Council in *Secretary of State for Foreign Affairs* v. *Charlesworth*,

(1) See Hertslet's Collection of Treaties and Conventions, vol. 2 (1827), p. 350.

(2) [1895] A. C. 656.

Pilling & Co. (1) The passage is as follows: "The English law again for certain purposes, of which the present purpose" (namely the determination of the title to immovables in Zanzibar) "is one, incorporates the local law of Zanzibar. But throughout the matter Zanzibar remains foreign territory, and the Queen and her officer are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits a sovereign power. It results that a judge acting within these limits is a Zanzibar judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him." In my opinion this passage, when rightly understood and taken as a whole, is not opposed to but confirms the view that a Court such as the consular Court in Egypt is acting under the authority of the King and not of the ruler of Egypt. The King's authority, says the Judicial Committee, is within its limits a sovereign power. The Court derives its jurisdiction, then, from a limited sovereign power exercising its authority in Egypt, and is for that reason—namely, that its authority is exercised in Egypt and is conferred by a sovereign power, His Majesty the King acting for that purpose within his limited sovereign authority in Egypt—an Egyptian Court. This character would be sufficient to enable the Court to take cognizance of the Egyptian law relating to immovables as part of the law of the locality in which it acts, but it is quite a different thing to say that the jurisdiction which it exercises is Egyptian and the law which it administers is part of the Egyptian law.

On the whole, then, I am of opinion that a new domicil of choice is not obtained by a British subject by residence in Egypt with the intention of making it his permanent home, for the reason that such residence does not involve any legal relation between him and that country, and accordingly that the appellant's domicil of origin remains unaffected and the Court has therefore jurisdiction to dissolve his marriage.

I may point out that the Order in Council is framed in accordance with this view, inasmuch as, while it confers on the consular Court that part of the matrimonial jurisdiction which does not affect personal status, it excludes from its jurisdiction dissolution, nullity, and jactitation of marriage, which do affect personal status.

(1) [1901] A. C. 373, 385.

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If the decision in this case were otherwise, there is no means by which the marriage could be judicially dissolved—not by this Court because ex hypothesi it has no jurisdiction as the appellant is not domiciled here, and not in Egypt because the only Court before which he can be brought has no jurisdiction to entertain the suit.

In my opinion the appeal fails and must be dismissed with costs.

SCRUTTON L.J. I regret that, after careful consideration of the arguments and the judgments that have been delivered, I have come to the conclusion that this appeal should be allowed.

Jeanne Casdagli brought a petition for dissolution of marriage against her husband, Demetrius Casdagli, alleging marriage and residence in Egypt. The English Court adopts the principle that the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage: *Le Mesurier* v. *Le Mesurier* (1); *Bater* v. *Bater*. (2) The husband therefore presented an act on petition alleging that he and his wife had at the institution of the suit a domicil of choice in Egypt and that the British Court had therefore no jurisdiction over the marriage. Horridge J., sitting in the Probate Division, dismissed the petition, holding that he was bound by certain statements of the law to decide that a British subject could not acquire a domicil of choice in Egypt, a country where he had ex-territorial privileges. The husband appeals against this judgment. The immediate question involved is whether a husband who was born in England, but has lived for many years in Egypt with intention to remain there, and has married a Greek lady there, can be called upon to submit his matrimonial differences to a Court in England. But the case raises wider questions of considerable difficulty and of far-reaching importance as affecting the view taken by the English Courts of the status and domicil of large numbers of British subjects, and subjects of other European States resident in Eastern countries where privileges to European subjects in the nature of what are called ex-territorial jurisdictions exist.

In dealing with domicil voluntarily acquired the English Courts usually look at the fact of residence and the intention of remaining in that residence permanently and combine the two in the expression

(1) [1895] A. C. 517, 540. (2) [1906] P. 209.

"a permanent home." If this is all that is necessary to make a domicil of choice, Horridge J. has found, and I agree, that the husband voluntarily fixed his sole or chief residence in Egypt with the intention of continuing to reside there for an unlimited time. The facts on which this judgment was based and the finding itself were not challenged before us, and I refer to their statement in the judgment below.

The husband was born in England of parents who at the time of his birth were naturalized British subjects, and he has never lost his British nationality. He is registered at the British Consulate in Alexandria as a British subject.

Egypt since December 18, 1914, has been an independent State, free from the suzerainty of Turkey, but subject to the protection of Great Britain, that is, a British Protectorate. On February 9, 1915, the Sultan of Egypt issued a decree that the exceptional jurisdictions recognized up to the present in Egypt should continue to enjoy the privileges ("attributions") which they enjoyed at the time of cessation of Ottoman sovereignty, and the Egypt Order in Council of February 16, 1915, continued in force all Orders in Council formerly in force in Egypt.

The position in Egypt and Turkey before 1914 depended primarily on the Capitulations, a series of grants of privileges by the Sultan to various European Powers in respect of their subjects dating from the time of Elizabeth, and confirmed in 1809 by the Treaty of the Dardanelles. Secondarily it depended upon an elaborate series of arrangements by which subjects of European Powers became more and more subject to Egyptian taxation and Egyptian law. The material articles of the Capitulations are as follows (I take them as read and refer to articles 15, 16, 24, 26, and 61).

By the Ottoman Order in Council of 1910 His Majesty in Council, acting under the powers of the Foreign Jurisdiction Act, 1890, after reciting that by treaty, capitulation, grant, usage, sufferance, and other lawful means, His Majesty "has jurisdiction within the dominions of the Sublime Ottoman Porte," provides by art. 3 that "in the construction of the Order 'British subject' includes a 'British protected person'"; and again, I refer, without reading them, to arts. 5, 6, 8, 35 (2.), 90, 103, 107, and 139. It will be seen that the consular Court in Egypt had no jurisdiction to dissolve the

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marriage in question, and if the English Court has no jurisdiction the marriage is indissoluble by a Court, a position not peculiar to Egypt, but the same as that which exists in Ireland to-day in respect of marriages of persons domiciled in Ireland. Lord Watson in 1888, in delivering the judgment of the Privy Council in *Abd-ul-Messih* v. *Farra* (1), stated what he understood to be then the position of British subjects in Egypt. Many things have happened in Egypt since 1888, and I do not think it is safe to take Lord Watson's statement as accurate at the present day. He treats British subjects as immune from taxation; but Mr. Scott in his work on the law affecting foreigners in Egypt (2) states that no tax of any importance exists at the present time in Egypt which is not paid by foreigners as much as natives. Lord Watson in 1888 states that British subjects are amenable only "to the jurisdiction of our consular Courts in matters civil and criminal." Mr. Scott's work in 1908 states that "their own national law applies in all questions of their personal status, in the case of crimes and delicts committed by them, and in civil and commercial cases where both parties are of the same nationality; but in other matters a large body of Egyptian law applies to them, administered by the Egyptian Courts and Mixed Tribunals." We have not the materials, in my opinion, to state accurately the position in Egypt at the present day, but the idea of a privileged foreigner who is in no way controlled by Egyptian law requires, it is clear, considerable modification. It seems clear, at any rate, that in Egypt, amongst other matters, questions of personal status or status of a foreigner whose State is a party to the Capitulations are decided by the consular Court of the nation of which the person is whose status is in question is a subject, and according to the law of his country. Thus, any nation, at Courts endeavouring to determine status by the lex domicilii of the person whose status is in question will find themselves, if that person is held to be domiciled in Egypt, referred by the law of Egypt to a Court which would administer the national law of such person. What is the effect of this and of the fact that the husband in this case is, in Egypt, in some respects within a privileged, sometimes called an ex-territorial, jurisdiction exercised by his own sovereign

(1) 13 App. Cas. 439.
(2) Scott's Law affecting Foreigners in Egypt as the Result of the Capitulations (1908 ed.).

in another State, though by the permission or grant of the sovereign of that State ? One of the foreign jurists says that it is marvellous how learned men have sweated in the definition of domicil. I am content to take Mr. Dicey's definition, which is as follows (1): "The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law." Instances of the latter part of the definition are the domicil of origin (which may be his father's or grandfather's domicil) of a man who has no permanent home or the domicil of a wife, who takes her husband's domicil however acquired.

I think the present case involves the question whether any rule of law prevents a man, who both resides and intends to reside permanently in an Eastern country where by treaty he is subject in all or some respects to ex-territorial jurisdiction of his sovereign, from acquiring a domicil of choice there, his lex domicilii being the law which the sovereign of the country allows the foreign sovereign to administer.

The question may be stated in another way. Besides the two requisites for a domicil embodied in most definitions—(1.) residence in fact, (2.) intention to reside permanently—is there another or others, stated by Chitty J. in *Tootal's Trusts* (2) to be membership "of a community which is not the community possessing the supreme or sovereign territorial power" in the locality; by Lord Watson in *Abd-ul-Messih* v. *Farra* (3), negatively, that the person residing shall not be a privileged member of an ex-territorial community; and by Farwell J. in *In re Johnson* (4), that the Government of the locality of residence should treat that residence as a ground for applying its law, for without that there was no residence and no domicil ? If these three learned judges were right all the learned men who have defined domicil have failed to include an essential requisite of domicil in their definition. See Dicey's Conflict of Laws, Appendix, p. 371. Lord Westbury in *Bell* v. *Kennedy* (5), in a passage which seems to me easier to quote

(1) Dicey's Conflict of Laws, 2nd ed., p. 82.
(2) 23 Ch. D. 532, 538.
(3) 13 App. Cas. 439, 445.
(4) [1903] 1 Ch. 821, 828.
(5) L. R. 1 H. L. Sc. 320.

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than to understand, said with respect to domicil: "It is the relation which the law creates between an individual and a particular locality or country." The case itself had no reference to the points discussed in the present case, and only involved the question whether a particular man had or had not an intention permanently to reside in Scotland; and the remark quoted does not, with great respect to its author, seem to me to assist the determination of that question.

The first stage of the question seems to be, Is there a domicil or permanent home?—which depends on the fact of residence and the intention to continue to reside. The law of England generally determines the status of a person, who may be contended to be subject to various laws which may conflict (as the lex domicilii, the law of his national character, the lex loci actus or solutionis) by the lex domicilii. The second stage of the inquiry is, Is there a lex domicilii which the English Courts will recognize? The country of the permanent home may have no settled Government and no law. If a misanthropist should reside on the Antarctic continent with the intention of remaining there till his probably speedy death, I think he would have a domicil or permanent home, but no lex domicilii. If the country had laws, but of a polygamous and cannibalistic nature, recognizing no private property, again the English Courts would find no lex domicilii they could recognize. But if there is a Government in the locality, with a system of law and Courts, established or permitted to exist, which applies to the person who has a permanent home, there appear to be a domicil and a lex domicilii which can be recognized and applied. Knowledge of the place of residence and the country in which it is situate and of the Government may not tell you the lex domicilii. The Government of the domicil may administer varying law according to the creed of the domiciled person. The lex domicilii of the Hindu domiciled in India is different from that of the Mussulman so domiciled. The law administered may vary with the nationality of the resident; a German Court may administer different law for a Belgian and a Russian in the matter of status. The law of the domicil would appear to be the law which the sovereign of the domicil would administer in the case of the domiciled person. If so, can it make any difference whether the sovereign of the domicil

administers the law directly, or allows another sovereign by grant to exercise part of his sovereignty by administering such law as he pleases in Courts which the sovereign of the domicil allows to exist in his territory? The law appears to be still the law of the domicil, allowed to be administered in the country of the domicil by the sovereign power of that country, whose consent is necessary for its administration. Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of domicil looks to or sends back (*renvoyer*) the decision to the law of nationality, there is an inextricable circle in "the doctrine of the *renvoi*" and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law as to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says "We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects." This is the German solution of the difficulty.

As a matter of principle apart from authority, I am unable to see why the fact that the sovereign of a country has granted to another country the privilege of exercising jurisdiction over its subjects within his dominions according to its own law should prevent a subject of the latter country who resides and intends permanently to reside in the former country from acquiring a domicil there. He will have a lex domicilii, namely, the law which the sovereign of the country allows to be applied to him by Courts which that sovereign allows to exist. I can understand that where the locality is Eastern it may require much more evidence to support a conclusion that a European citizen intends to give up his Western home and per-

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manently to stay in the East. This consideration is not applicable to the spouses in the present case, who are of Greek origin with no particular connection with Western European civilization, and would hardly apply at all to British subjects of Eastern origin. But I cannot see in principle how this consideration renders the existence of such a conception as domicil impossible where residence and intention to reside permanently concur. The contrary view appears to me to be an attempt to reintroduce the doctrine that you cannot acquire a domicil in a foreign country, unless you intend to abandon your nationality. This view was decisively negatived by the House of Lords in *Udny* v. *Udny*. (1) It appears also to be an attempt to make domicil depend on membership of a community subject to so-called ex-territorial jurisdiction, not on residence in a locality. If ex-territorial jurisdiction meant that the territory in which residence took place belonged to a foreign sovereign and was governed by his law, I could understand the contention that no domicil existed in the country out of which the ex-territorial jurisdiction was carved. But it is only the precincts of embassies, and to some extent ships, of the foreign nation which are in such a position. Where the territory of residence belongs to a sovereign, who grants or allows a certain law to exist in it for certain persons, I can see no reason in principle why there should not be a domicil and a lex domicilii.

For similar reasons on principle I cannot think that the fact that the law of the place of residence would decide in its Courts a particular question according to the law of nationality of the party concerned prevents there being a residence in fact which can with the proper intention or animus constitute a domicil, while there is a lex domicilii, a law which the Courts of the domicil would apply in the particular case.

I cannot see on principle why a British subject who was born an Indian Mussulman should not acquire, by residence and intention to remain, a domicil in Egypt, or why the fact that the Sovereign of Egypt allows the Emperor of India to decide the status of his subject in his Courts in Egypt by the law of his nationality and creed should destroy the possibility of an Egyptian domicil. What happens in Egypt will, it is admitted, destroy a previous domicil of choice; I think it can also create a new one.

(1) L. R. 1 H. L. Sc. 441, 458.

I now turn to consider, for the purpose of seeing whether they prevent my adopting the principles I have discussed, the authorities directly bearing on the point. In the first place, one may put aside those cases in which so-called "commercial domicil," which regulates neutral or enemy character in time of war, is considered on grounds which are wholly different from those in the present case. Sir William Scott (afterwards Lord Stowell) in the cargo claim (*Millar's Case*) in *The Indian Chief* (1) held that an American trading in India when it was governed by the East India Company was in effect a British merchant who could not trade with the enemy, and that he did not take a neutral character as a subject of the Government of the Great Mogul. This was supported by considerations of the effect of the factory system in the East, by which foreign residents took the nationality of their factory and not of the Eastern ruler of the country, and by the so-called "immiscible" character of foreigners in the East. On the latter point Lord Stowell did not foresee the rise of Japan. This decision has been followed in the present war by the Prize Courts in Egypt in the case of Germans resident in the German settlements in China, who have been treated as Germans and not Chinese. "Commercial domicil" differs in so many respects from "civil domicil" that I do not think these cases useful in dealing with the present question: *The Derfflinger* (*No.* 1) (2); *The Lutzow.* (3)

The numerous cases on so-called "Anglo-Indian domicil" do not appear to me to affect the matter. The officers who entered the service of the East Indian Company, though they hoped to return at the end of their service, were held, by their service, and contrary to the ordinary definition of domicil, to acquire a domicil in India by which they were subject to the laws affecting Englishmen in India, and their previous domicil of origin or choice was lost: per Turner L.J. in *Jopp* v. *Wood* (4) and Cotton L.J. in *In re Mitchell.* (5) This law did not apply to officers in the service of the Crown as distinct from the East India Company, for they were not bound to serve exclusively in India. In the case of civilians they might, as in *Cockrell* v. *Cockrell* (6), or might

(1) 3 C. Rob. 22.
(2) 1 Br. & Col. P. C. 386.
(3) Ibid. 528.
(4) 4 D. J. & S. 616, 623.
(5) (1881) 13 Q. B. D. 418, 423.
(6) 25 L. J. (Ch.) 730; 2 Jur. (N.S.) 727.

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not, as in *Jopp* v. *Wood* (1), acquire an Indian domicil of choice by the ordinary means, and the lex domicilii applicable to them was the law which the Governors of India would apply to a person of British nationality as distinct from a person professing the Hindu or Mahomedan religion. Each of these three classes, having an Indian domicil, would, by the law of India, be subject to different laws, according to his race or creed. But in these cases there would be no question of different sovereignty; no other sovereign would, even by permission of the Sovereign of India, exercise different jurisdiction. When Lord Watson in *Abd-ul-Messih* v. *Farra* (2) speaks of Anglo-Indian domicil he is speaking, not of the original Anglo-Indian domicil, derived from service in India under the Company though with an intent to return to England, but of the domicil in the ordinary sense of a permanent home acquired by an Englishman by residence in India and intent to remain there, with the consequence that the resident is subject to rules and customs depending on his nationality or creed, but administered by the territorial tribunal as part of municipal law. "Indian" refers to the domicil and "Anglo" to the law. When Chitty J. in *In re Tootal's Trusts* (3) speaks of a Mahomedan who has become domiciled in India acquiring an Anglo-Indian domicil, the learned judge appears to mean that his status will be regulated by the law which the Government of India applies to Mahomedans in India, but he uses "Anglo-Indian" in a sense in which no other authority uses it. The first authority claimed to be relevant is the decision of Dr. Lushington in 1844 in *Maltass* v. *Maltass*. (4) The Maltass in question was the son of a British subject who had traded at Smyrna; he himself was born and had always traded at Smyrna. The question was as to the disposition of his property on his death. It is necessary to distinguish the decisions and the opinions of Dr. Lushington. He decided that as, if Maltass was domiciled in Turkey, the law of Turkey regulated the succession by English law, and if he could not acquire a domicil in Turkey, the law of England, his and his father's domicil of origin, prevailed, the disposition was governed in either case by English law, and it was not necessary to decide whether a Turkish domicil could be acquired by a British

(1) 4 D. J. & S. 616, 623.
(2) 13 App. Cas. 439.
(3) 23 Ch. D. 532.
(4) 1 Rob. Ecc. 67.

subject. He also decided that, if Turkish domicil was possible, the Capitulations applied to a British subject domiciled in Turkey, as they did to a British subject merely temporarily resident there. But as a matter of opinion he said (1): "I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell" (in *The Indian Chief* (2)) "has said does apply in cases of a total and entire difference of religion, customs and habits." Dr. Lushington apparently did not see any difficulty in an Indian subject of the Crown while retaining British citizenship and being by the Capitulations the subject of ex-territorial jurisdiction becoming domiciled in Egypt, but he was not deciding the matter. He also treated the deceased as domiciled in England and not in Scotland or a Colony (3): "For great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question if he had been domiciled in British Guiana." This, to me, puzzling passage appears to point to the question whether the Turkish Sovereign, by referring to the law of England, meant the English law strictly so-called and applicable to an English subject, or the law which British Courts would apply to a British subject domiciled in another part of the dominions. The Sultan probably did not appreciate or care about the distinction, and Dr. Lushington did not decide the question.

In 1883 Chitty J. decided the case of *In re Tootal's Trusts* (4), the question being whether the property of a deceased British subject, who died in China, was liable to pay English succession duty, which turned on whether the deceased had lost his English domicil. Evidence was given of sixteen years' residence in fact and expressions of intention never to return. But counsel admitted that the testator's domicil was not Chinese, apparently meaning that he had not intended to subject himself to the law applicable to Chinamen, but contended that it was "Anglo-Chinese," apparently meaning that he was subject to the law which China allowed to be applied to Englishmen by the consular Courts of the Queen. Chitty J.

(1) 1 Rob. Ecc. 80, 81.
(2) 3 C. Rob. 22.
(3) 1 Rob. Ecc. 80.
(4) 23 Ch. D. 532.

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said that domicil depended on locality, not on community, and that there was no instance of domicil as a member of a community which was not the community possessing the supreme power. He treated the different laws in British India as merely parts of the law of the governing community, speaking of the Mussulman who settled in British India as acquiring an "Anglo-Indian" domicil—that is, that he would enjoy the civil status that the laws of British India give to Mussulmans. He distinguished the testator's case as one where it was alleged that the law of the domicil was the law, not of the sovereign power of China, but of another power. Chitty J. appears to recognize no other classes than (1.) a British subject governed by the laws of England, and (2.) the same subject intending to be governed by the laws of China (which latter intention, owing to differences of religion, habits, and customs, he says is almost impossible) and not to consider it possible for a man to be a British subject intending to make China his home because he knows that the Chinese Government will deal with him, or allow him to be dealt with according to the laws of England, and having a domicil in China, his lex domicilii being the law which the Chinese Government applies to English subjects, namely, English law. He therefore held "there was no such thing known to the law as an Anglo-Chinese domicil."

In 1888 the Privy Council decided the case of *Abd-ul-Messih* v. *Farra*. (1) The testator was Turkish-born and had lived at Cairo for twenty-seven years as "a protected person," jurisdiction over whom was by the Order in Council of 1873 in the English consular Courts, though the Capitulations did not appear to take any notice of such a person. It was contended that this gave him an English or "Anglo-Egyptian" domicil, and it was held that residence in Egypt, then part of the territory of Turkey, did not destroy his Turkish domicil, though he was under the protection of a community or power whom the Porte allowed to govern its own subjects by its own law, for domicil depends on locality, not on membership of a community. The Court, therefore, treated the deceased's domicil as Turkish and applied the lex domicilii, namely, that law which the law of Turkey would apply to a Chaldean Christian, a Turkish subject and resident in Turkey. This case, amongst

(1) 13 App. Cas. 431.

other things, appears to show that the fact that a man is under the sole jurisdiction of a foreign Power does not affect his domicil, whether of origin or choice, apart from that jurisdiction. But the judgment of the Privy Council contains two passages which go beyond the point to be decided in that case, but which are said to contain the principle to be applied in this case :—1. " Residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil." (1) This appears to me to leave open the question what happens when the municipal laws and customs of the country vary according to the creed or nationality of the person resident there, and where the municipal law in some cases enforces the law of the nationality. France applies to British subjects domiciled there the law of their nationality, but until Farwell J. said so in *In re Johnson* (2) I do not know that any authority said that this destroyed the domicil. 2. " Residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice." (3) This passage, if correct, decides this case in favour of the respondent. It was not necessary for the decision of that case, and, while entitled to the greatest respect, is not binding on this Court. The question is whether it is correct. This is the authority on which the judge of the Egyptian Prize Court founds his remarks in *The Derfflinger* (*No.* 1) (4): " It has been settled that no British subject can change his legal domicile, by residence in any place where the Crown has ex-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed on the British community, is, I think, the effect of *In re Tootal's Trusts*." (5) The last remark is interesting in view of the suggestion that *In re Tootal's Trusts* (5) is an Imperial asset which should not be lightly disturbed.

In the same year, 1888, Chitty J. in *Abdallah* v. *Rickards* (6), while recognizing that an Englishman might acquire a Turkish domicil, held proof that he had registered as a British subject prevented its being inferred that he had lost his previous English domicil.

(1) 13 App. Cas. 439.
(2) [1903] 1 Ch. 821.
(3) 13 App. Cas. 445.
(4) 1 Br. & Col. P. C. 386, 389.
(5) 23 Ch. D. 532.
(6) (1888) 4 Times L. R. 622.

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In 1895, in *Imperial Japanese Government* v. *P. & O. Steam Navigation Co.* (1), the Privy Council, in explaining the system of ex-territorial jurisdiction existing in Japan and its effects, describe it as "The jurisdiction which the sovereign power of Japan, in derogation of its sovereign rights, has granted to the British consular Court." This, if I may respectfully say so, appears accurately to state the legal origin of so-called ex-territorial jurisdiction. The principle was applied in detail by the Privy Council in 1901 in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (2), where the effect of ex-territorial legislation in Zanzibar was considered, and it was stated that the Queen's Courts there were acting by grant from the Sultan of Zanzibar of part of his sovereign power, and that the judge was therefore a Zanzibar judge; that ex-territoriality did not make land owned by a British subject in Zanzibar English land, but land subject to the lex loci, that is, Zanzibar law; and that as the judge was a Zanzibar judge deriving his authority from the Sultan of Zanzibar he was bound to take judicial notice of this law, and not entitled to require it to be proved as a fact. The exact point decided in this case, on which the whole decision turns, was that the Zanzibar Court was not an English Court, in which case it would have required evidence of the lex loci rei sitae, a foreign law, but a Zanzibar Court, and therefore bound to take notice of its own law.

Lastly, in 1909 the Supreme Court of Maine had before it a case of *Mather* v. *Cunningham* (3), where a United States citizen born in Maine had lived for thirty-five years at Shanghai. His will was invalid by the law of Maine, but valid by the common law of the United States administered under the Act of Congress by the consular Court at Shanghai, existing under a treaty with the Emperor of China. The Court, after reviewing all the authorities cited, held that a domicil in China had been acquired in fact and was not rendered inefficacious by the fact that the resident was under ex-territorial jurisdiction, the lex domicilii being the law which China allowed to be administered in the case of such a citizen, namely, the common law of the United States. This is, of course, directly contrary to the dicta in *In re Tootal's Trusts* (4) and

(1) [1895] A. C. 644, 656.
(2) [1901] A. C. 373.
(3) 105 Maine Rep. 326; 74 Atlantic Reporter, 809.
(4) 23 Ch. D. 532.

Abd-ul-Messih v. *Farra* (1), but appears to work out the principle of origin of jurisdiction laid down in the Japanese and Zanzibar cases in the Privy Council.

It remains to mention an authority on similar lines to the English dicta, the decision of Farwell J. in *In re Johnson.* (2) A British subject born in Malta became, if residence and intention were sufficient, domiciled in the Duchy of Baden in the Empire of Germany; but the Chancery Master found that by the law of Baden the legal succession to her property was governed by the law of her nationality. Farwell J. took the view that domicil required animus and factum, that is, residence; and you could not have legal residence in a country which did not treat residence as a ground for applying its law. Without residence you could not have domicil. Farwell J. said (3): "This Court must conclude that a domicil of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicil at all, and that the propositus, therefore, is left with his domicil of origin unaffected." As a fact, though the Master made his finding, and Farwell J. acted on it, that the domicil created no rights, Sir F. Pollock points out (4) that the German Code, while primarily referring to nationality, and therefore directing the German Court to decide succession by the deceased's national law, provides that if that national law recognizes German law (that is, the internal law applicable to German subjects) as applicable (as the lex domicilii), German Courts shall apply that law. It seems, therefore, incorrect to say that the domicil of choice was ineffectual to create any rights, while it might also be said that the lex domicilii was applied by administering the national law which the German Courts would have applied to such a case. This decision was followed by Swinfen Eady J. in *In re Bowes* (5), where the testator was in fact domiciled in France but was not legally registered. The learned judge followed *In re Johnson* (2) and applied English law: apparently, according to the evidence, the French Courts would have done the same. If this case proceeded on the view that residence in France without legal registration gave

(1) 13 App. Cas. 431.
(2) [1903] 1 Ch. 821.
(3) Ibid. 828.
(4) Ibid. 831.
(5) (1906) 22 Times L. R. 711.

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no civil rights in France, it appears inconsistent with *Hamilton* v. *Dallas* (1); but it seems that the French Courts would have applied the same law as the English Courts did.

Of these authorities the Privy Council decisions in the Japanese and Zanzibar cases support the view that the ex-territorial jurisdiction derives its authority from the independent sovereign of the domicil, and does not prejudice a domicil in a territory with a sovereign and a lex domicilii applicable to the case. It is not necessary to rest the domicil, as Chitty J. does in *In re Tootal's Trusts* (2), on membership of a community which is not the sovereign power. Membership of such a community may still determine the applicable provisions of the lex domicilii, as it admittedly does in British India. The view suggested in the authorities as to the strong presumption against acquiring a domicil in Eastern communities is not affected by the principles I have suggested, though the progress of Japan and Egypt prevents any talk about "immiscibility" as an absolute rule; and Dr. Lushington in *Maltass* v. *Maltass* (3) contemplates a British Indian Mussulman acquiring a domicil in Turkey, though a privileged person. The dictum in *Abd-ul-Messih* v. *Farra* (4) is directly contrary to the principles I have discussed, but no reason is given for it, and I cannot see why residence as a member of a community, where the community has no local territory, can destroy a domicil which is based on residence in a locality under the Government of the sovereign of the territory, or affect the lex domicilii which the sovereign power allows to be applied to such a resident. The principles I have stated are in accordance with the United States decision, and substantially agree with the opinions of international jurists, to whose opinions more weight is attached in these Courts in questions of public and private international law than in matters of local law. I especially refer to the late Professor Westlake and Sir F. Piggott. There appear to be no English authorities binding on the Court of Appeal which prevent my adopting them as correct.

It is said that many questions of status have been regulated by the principles of *In re Tootal's Trusts* (2), and it should not, therefore, lightly be disturbed. In my view, as in Dr. Lushington's in

(1) (1875) 1 Ch. D. 257.
(2) 23 Ch. D. 532.
(3) 1 Rob. Ecc. 67.
(4) 13 App. Cas. 431.

Maltass v. *Maltass* (1), the same law will be administered to British subjects in Egypt, whether they are held domiciled there or residents with the intention of returning. It is only so far as domicil is treated as the condition precedent for certain rights or jurisdictions that the position will be affected. The English Courts whose jurisdiction depends on English domicil will not, in my view, have jurisdiction to dissolve the marriage of English subjects domiciled in Egypt, but I cannot believe that any pair of spouses have entered into marriage relying on a careful consideration of the decision in *In re Tootal's Trusts* (2), and I see great disadvantages in requiring a couple whose whole life is Greek and Egyptian, and whose permanent home is in Egypt, to decide their matrimonial differences a thousand miles away in a Court which generally excludes affidavit evidence and looks unfavourably on evidence on commission, and where personal attendance in England will therefore be desirable. If domicil in Egypt cannot be acquired by a British subject where such a subject has lived all his life in Egypt and always intends to live there, he or his estate may be dealt with in England by a writ issued out of the jurisdiction under Order XI., r. 1, head (*c*) or (*d*), if only he has a domicil of origin in England, though the matter to be dealt with may be purely Egyptian.

After careful consideration of the authorities and arguments and the views of the jurists to whose writings we were referred, I have come to the conclusion that this Greco-Egyptian married couple have a domicil in Egypt, where they obviously have their permanent home, and that the English Court has therefore no jurisdiction to dissolve their marriage.

In coming to the conclusion that the decision of Horridge J. should be reversed it is some satisfaction to me to believe that he would, as appears from his judgment, have come to the same conclusion as I have but for authorities which he considered bound him, but which do not, in my opinion, bind the Court of Appeal.

Appeal dismissed.

Solicitors for appellant: *Hatchett-Jones & Co.*

Solicitors for respondent: *Treherne, Higgins & Co.*

(1) 1 Rob. Ecc. 67. (2) 23 Ch. D. 532.

1918
Feb. 4.

PROBATE.

In re WILLIAMS.

Probate—Practice—Executor passed over—Absconding Executor—Citation dispensed with—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

A sole executor appointed by the testatrix's will fled the country under fear of criminal proceedings seven years before the testatrix's death and had not since been heard of. On the application of one of two residuary legatees, with the consent of the other, the executor was passed over without citation, and administration with the will annexed made to the applicant.

The testatrix, Agnes Williams, by her will dated August 4, 1909, appointed William Sandles sole executor, and left the whole of her property to her two sons in equal shares. She died in 1917. William Sandles, who was a solicitor's clerk, had fled the country in 1910, in fear of criminal proceedings, and had never since been heard of. The estate was of the value of 400*l.* or thereabouts.

This was an application under the Court of Probate Act, 1857, s. 73, by one of the sons, with the consent of the other, for a grant of administration with the will annexed, passing over the executor without citing him.

Bayford, for the applicant, cited *In the Goods of Drawmer* (1) and *In the Goods of Wright.* (2)

Lord Coleridge J. made an order in the terms of the motion.

Solicitors: *George Thatcher & Son.*

(1) (1913) 108 L. T. 732. (2) (1898) 79 L. T. 473.

J. R. B.

ADMIRALTY.

(In Prize.)

1918
Feb. 14, 15, 19.

THE BONNA.

[1916, No. 1247.]

Prize Court—Contraband—Doctrine of Continuous Voyage—Edible Fats to be manufactured in Neutral Country—Other Edible Fats thereby released for export to Enemy Country—Limits of Principle of Substitution.

A quantity of cocoanut oil (conditional contraband), the property of the claimants, a Swedish company of margarine manufacturers, was seized as prize ex a neutral vessel. The Crown claimed the condemnation of the oil on the ground, inter alia, that, assuming it was acquired for the manufacture of margarine, it formed part of the supply of a reservoir of edible fats part of which went to Germany, or that the margarine manufactured therefrom would, to the knowledge of the claimants, be consumed in Sweden in substitution for Swedish butter supplied to Germany :—

Held by the President (Sir Samuel Evans), that had it been shown that the oil was imported for the manufacture of margarine to be sent to the enemy, or even that the particular manufacturers of margarine were acting in combination with particular producers of butter, and that the intention and object of their combination was to produce margarine in order that the butter might be sent to Germany, he would have held that the oil was subject to condemnation ; but that it was not in accordance with international law to hold that raw material on its way to citizens of a neutral country, to be there manufactured into an article for consumption in that country, was subject to condemnation merely on the ground that the consequences were that another article of a like kind would be exported to the enemy by other citizens of the neutral country.

In this case, which governed a number of others, the Procurator-General, on behalf of the Crown, claimed the condemnation of 416 tons of cocoanut oil seized at Bristol on August 27, 1916, ex the Norwegian steamship *Bonna*.

The claimants, the Nya Margarin A/B. Svea, of Kalmar, Sweden, claimed the release of the oil on the ground that it had been bought by them for the purpose of the manufacture, in their own factory, of margarine for sale and consumption in Sweden.

The case is reported on the alternative question argued on behalf

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of the Crown that, assuming the claimants established that the oil was destined solely for the Swedish factory, it should be deemed to have an enemy destination on the ground that it helped to form part of a reservoir of edible fats part of which went to Germany, or that the margarine manufactured from it would, to the knowledge of the claimants, be consumed in Sweden in substitution for butter exported to Germany. On this latter point it appeared from an affidavit by the Controller of the War Trade Statistical Department that before the war Sweden exported about 76 per cent. of her surplus butter to the United Kingdom and Denmark, and that the quantity exported to Germany was 2·3 per cent. After the outbreak of war the export to the United Kingdom, and in a lesser degree to Denmark, decreased, until by June, 1916, it had dwindled to less than 0·4 per cent., while Germany was receiving 98 per cent. of the total export. During the second half of 1916 large quantities of edible fats and oils suitable for margarine manufacture were seized as prize, with the result that, whereas in July, 1916, 1716 tons of butter were exported, 1701 of which went to Germany, in December, 1916, less than one ton was exported, and from January to October, 1917, only one and a half tons were exported to Germany.

1918. Feb. 14, 15. *R. A. Wright, K.C.* (with him *Sir Gordon Hewart, S.-G.*, and *J. G. Pease*), for the Procurator-General. The evidence shows that a very large stock of edible fats, far in excess of home requirements, has been collected in Sweden, and that the excess has been exported to Germany. The oil in question would have helped to supply the reservoir of edible fats, of which the excess, after supplying the Swedish demand, goes to Germany in the form of butter. In these circumstances the Crown, in exercise of its belligerent rights, is entitled to regard the source of supply of this reservoir as a whole, and to seize and condemn the waterborne portion of it as contraband which must be deemed to have an enemy destination. In *The Balto* (1) it was held that leather, destined for the German Army in the shape of boots, was subject to seizure on its way to the neutral factory in the form of undressed leather. The principle contended for in the present case is merely an extension of the doctrine laid down in *The Balto* (1) and approved by the Privy

(1) [1917] P. 79.

Council in *The Baron Stjernblad* (1) : see also *The Hakan* (2), where the principle of substitution was admitted. In that case the Privy Council upheld the decision of the Prize Court that conditional contraband (fish) destined for Germany to be delivered to the Central Purchasing Company—a body controlled by the Government—was confiscable, as, although the fish itself might ultimately have gone to feed civilians, the rations supplied to the Army would thereby be increased.

Leslie Scott, K.C., and *Le Quesne*, for the claimants. The evidence is uncontroverted that this raw material was intended for the claimants' factory and for neutral consumption when manufactured into margarine, and no question of contraband destination arises. There is no authority for the proposition that raw material with a neutral destination is confiscable when the manufactured product would be consumed in the neutral country of importation merely because such consumption enables other persons in the neutral country to export a totally different product to an enemy country. The proposition suggested is a wholly unwarrantable extension of the doctrine of continuous voyage and totally at variance with the well-recognized principles of international law on the subject.

Pease in reply. The cases which have been cited establish the principle that if goods of the same kind are destined for an enemy country the particular goods need not be identified. It is submitted that the doctrine of continuous voyage applies also to goods of the same species. The article imported into the neutral country and exported to the enemy country is edible fat, and it matters not that the one is called " margarine " and the other " butter." In view of the ramifications of modern commerce this is a justifiable extension of the doctrine of continuous voyage.

Cur. adv. vult.

Feb. 19. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment :—This claim relates to 416 tons of cocoanut oil shipped on the Norwegian steamship *Bonna*, and seized on August 27, 1916.

The claimants are a Swedish company of margarine manufacturers and dealers carrying on business at Kalmar. The company

(1) [1918] A. C. 173, 178. (2) [1918] A. C. 148.

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was formed before the war, but its business increased largely after the war. Cocoanut oil was declared conditional contraband by an Order in Council of October 14, 1915.

The case for the claimants was that the oil was their property, and was bought for the purpose of the manufacture of margarine in their own factory for sale and consumption in Sweden, and as such was not subject to capture or condemnation.

It was contended for the Crown that the claimants had failed to discharge the onus which, in the circumstances, rested upon them, to establish that the destination of the oil was neutral; and, further, that the oil was subject to condemnation on the ground either (1.) that it, and the margarine for the manufacture of which it was acquired, should, in the circumstances, be deemed to have an enemy destination; or (2.) that such margarine, when manufactured, would to the knowledge of the claimants be consumed in Sweden in substitution for Swedish butter to be supplied to Germany.

Of the total of 416 tons, 111 tons were shipped at Batavia and Sourabaya, in the Dutch East Indies, by G. H. Slot & Co. as consignors to Auguste Pellerin, Fils & Co. as consignees at Christiania; and 305 tons at Sourabaya by Burns, Philps & Co. as consignors to Anders Mellgren as consignee at Gothenburg. All the consignments were intended for the claimant company, which had bought the former lot through A. B. Nielsen & Co., of Christiania, and the latter through one Ole Boe, of the same city. The goods were sold and bought under f.o.b. contracts.

It was said that the first-named consignees, Auguste Pellerin, Fils & Co., were inserted in some of the bills of lading through a mistake of the shippers, which was not discovered till after the vessel sailed. While she was on her voyage the shippers caused a cablegram to be transmitted to her master asking him to alter the manifest by entering the name of Anders Mellgren as the consignee. This he did not do; but he pinned the cablegram to the manifest. Whether it was intended that he should alter the bills of lading or not is in doubt.

Anders Mellgren was the French consul at Gothenburg. He had no control over, or beneficial interest in, the goods. His name was used as consignee with his assent, accorded for a small commission.

The object of this was, according to the claimants' story, to facilitate the passage of the goods into Sweden by satisfying any British cruiser or examining vessel that the destination of the goods was neutral, and so to avoid the diverting of the vessel and her cargo to a British port for search and examination.

How the alleged mistake of inserting Auguste Pellerin, Fils & Co. in some of the bills of lading arose has not been shown as clearly as could be wished. But however that occurred, and whatever the object of consigning the goods to Mellgren may have been, the result was that the ship's papers did not show who were the real consignees for whom the goods were destined. This clearly placed upon the claimants the burden of proving that the goods did not have an enemy destination. Other matters arising upon the documents also required explanation; but I refrain from entering upon them, as that may be unnecessary in view of the decision to be pronounced upon the claim to the release of the goods.

As to the ownership and destination of the goods, having regard to all the circumstances (which need not be detailed), I have come to the conclusion that the oil was the property of the claimants, and was bought, and intended to be used, by them in their own factory in the manufacture of margarine; and that such margarine was intended for consumption in Sweden.

Apart from these questions of fact, counsel for the Crown rested their case upon a broader ground. Statistics were given in evidence to show the increase of the importation into Sweden of raw materials for margarine and of the production and sale of margarine, and to show the simultaneous increase of the export of butter from Sweden to Germany. They were interesting, and beyond doubt they proved that the more margarine was made for the Swedes the more butter was supplied by them to the Germans; and that when by reason of the naval activity of this country the imports for margarine production became diminished, the Swedish butter was kept for consumption within Sweden itself and ceased to be sent to the enemy.

Upon these facts counsel for the Crown formulated and founded their legal proposition. That proposition may be translated in practical terms, in relation to the facts of this case, perhaps more usefully than if it were stated in abstract language. So translated it may be stated thus: "Margarine and butter are of the same class

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of food, one being used as a substitute for, or even as an equivalent of, the other. Margarine was produced in Sweden—by the claimants among others—with the result that, to the knowledge of the manufacturers, the butter of the country was being sent to Germany, where it would pass under the control of the Government. There was, so to speak, one reservoir of the edible fats, butter and margarine. As one part of the contents—the butter—was conveyed away for consumption in Germany, the other part—margarine—was sent in to take its place for consumption in Sweden. If the one part could be captured as conditional contraband, the other part was subject to capture also; and not only that part when completely manufactured, but the raw materials for it as well."

No authority was, or could be, adduced for the proposition formulated in such an argument; but it was contended, nevertheless, that it logically followed principles recognized by international law.

Before pronouncing the decision of the Court I think it right to say that, if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination.

I should go even further and hold that, if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

But there is a long space between those two supposed cases and the one now before the Court; and this space, in my view, cannot be spanned by the application of the accepted principles of the law of nations.

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would, necessarily be that another

article of a like kind, and adapted for a like use, would be exported by other citizens of the neutral country to the enemy.

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I therefore allow the claim, and order that the goods seized, or the proceeds if sold, be released to the claimants.

Solicitor for Procurator-General: *The Treasury Solicitor.*

Solicitors for claimants: *Botterell & Roche.*

E. C. T.

DIVORCE.

1918

Jan. 22, 28.

NORRIS *v.* NORRIS AND SMITH.

Divorce—Practice—Costs against Co-respondent—Knowledge that respondent is married—Date of Knowledge—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 34.

The Matrimonial Causes Act, 1857, s. 34, gives the Court an absolute discretion as to costs. It is an established rule not to award costs in favour of a husband petitioning for a divorce against a co-respondent who had no knowledge that the respondent was a married woman. But it is too broad a statement of the rule to say that the co-respondent must have such knowledge at the time he first misconducted himself. In a case where adultery after knowledge is established the Court is not precluded from awarding costs by the mere fact that the co-respondent has also committed adultery at a date before he had knowledge. In a case where the proof of such prior misconduct depended only on confession the Court gave costs against the co-respondent.

THIS was a case of a husband's petition for dissolution of marriage.

The respondent did not appear. The co-respondent by his answer denied the charge, but in his evidence admitted misconduct in 1914, without, as he said, knowledge that the respondent was a married woman. Adultery at a later date when the co-respondent had knowledge was established to the satisfaction of the Court by independent evidence.

The respondent had also admitted misconduct in 1914; but the only evidence of knowledge by the co-respondent at that date was an admission by him in cross-examination that the respondent was then passing as Mrs. Norris and wearing a wedding ring.

The petitioner sued as a poor person.

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NORRIS v. NORRIS AND SMITH.

J. A. C. Skinner, for the petitioner. The Court has a discretion to order the co-respondent to pay costs, and this is a case in which it should be exercised: *Bilby* v. *Bilby and Harrop*. (1)

H. C. Bickmore, for the co-respondent, referred to *Learmouth* v. *Learmouth and Austin*. (2)

Cur. adv. vult.

Jan. 28. HILL J. In this case the petitioner has obtained a decree nisi and asks that he may have such costs as he may be entitled to against the co-respondent. On the one side it was argued that he was entitled to them, and on the other that he was not so entitled on the ground that, when the co-respondent first misconducted himself with the respondent, the co-respondent had no knowledge that she was a married woman.

Sect. 34 of the Matrimonial Causes Act, 1857, gives me a complete discretion as to costs, but the practice of the Court, long established, lays down guiding rules for its exercise. I am not going to depart in any way from that practice.

No doubt it is thoroughly well established that there can be no costs if the co-respondent did not know that the respondent was a married woman. But it is said that the rule goes further than that, and that the co-respondent will never be condemned in costs if he had not that knowledge at the time when he committed the first act of adultery. I do not think the rule is correctly stated in that broad way. In *Bilby* v. *Bilby and Harrop* (1) Lord St. Helier said that where a co-respondent has found out, when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs. But that was a case where the wife had begun the adulterous connection some years after she had separated from the husband. In such cases and where the adulterous wife is living with the co-respondent it is fair and proper enough that the co-respondent who does not desert his mistress upon learning that she is a married woman should not be punished in costs. I do not, however, think that the Court should go further than that, or that, when there is knowledge, the Court should be precluded from giving the husband costs by the mere

(1) [1902] P. 8. (2) (1889) 59 L. J. (P.) 14.

fact that the co-respondent also committed adultery before he had knowledge. Otherwise the risk might arise of the husband not getting his costs by reason of the wife confessing adultery prior in date to that established, and the husband not being able to disprove that earlier adultery.

In this case I do not believe that the petitioner could prove adultery anterior to 1915. Both the respondents have confessed to adultery in 1914, but the co-respondent denies knowledge at that time. There is no evidence from which I can arrive at a different conclusion apart from that of the respondent passing as Mrs. Norris and wearing a wedding ring. I do not think that it would be safe to find knowledge at the earlier date. The substantial evidence of adultery, however, on which I proceed, is that relating to the years 1915 and 1916, which carries far greater weight than that of the confessed adultery in 1914, and at the time of the adultery in 1915 and 1916 I find knowledge proved. I therefore exercise my discretion in awarding costs against the co-respondent. They will be on such a scale as a poor person may be entitled to under r. 30.

Solicitors for petitioner: *D. Figur & Co.*

Solicitors for co-respondent: *Peat & Manduell.*

J. R. B.

1918
Feb. 14.

DIVORCE.

LOOKER *v.* LOOKER.

Wife's Petition for Divorce—Desertion—Adultery—Deed of Separation—Covenant for Wife to live apart and for Payment of Allowance by Husband—Mutual Covenant not to sue for Restitution—Husband's Failure to pay Allowance and Repudiation of Deed—Deed no Defence to Suit.

A deed of separation provided for the parties living apart and contained a covenant by the husband to pay the wife a weekly allowance and a mutual covenant not to sue for restitution. The husband had failed to pay the allowance and repudiated the deed; the wife had not sued under the deed. The wife sued for dissolution of marriage on the grounds of desertion and adultery:—

Held, that under these circumstances the Court would not take notice of the deed:

And that, even if defending, the husband could not avail himself of the deed.

This was a wife's petition, filed in September, 1916, for dissolution of marriage on the grounds of her husband's desertion and adultery.

The parties were married in December, 1903. In January, 1908, a deed of separation was executed by both of them containing (inter alia) covenants that the wife might live apart; that neither party should molest or interfere with the other, or compel, or endeavour to compel, the other of them to cohabit or live with him or her by any legal proceedings for restitution of conjugal rights, or otherwise howsoever; and that the husband should pay to the wife a weekly allowance of 10*s*. The husband paid the allowance irregularly up to July 10, 1908, when he made a last payment, and within a few days after that date disappeared. The wife had not sued him under the deed. Proceedings had been taken against him by the guardians for leaving his family chargeable to the parish, and he had been sent to prison. On his release he left the country and his wife had never seen him since. He had written a letter refusing to pay the allowance.

The adultery was proved. The husband did not appear.

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Bayford, for the petitioner. The husband having repudiated the provision in the deed for the payment of an allowance cannot now set up the deed or any of its provisions. He could not do so even if he were defending the suit, and the Court will not set up the deed for him when he does not even appear. There is authority to that effect in the case of applications for restitution of conjugal rights, and there should be a similar result in the case of a petition for dissolution where the wife has not elected to sue under the deed. The practical effect of a deed as to a charge of desertion is the same in suits for dissolution as in suits for restitution : *Hussey* v. *Hussey*. (1)

LUSH J. I do not think that the husband can enforce the deed when he has clearly repudiated it, or that the Court should do it for him in his absence. I must make the decree nisi. (2)

Solicitors for petitioner : *Lumley & Lumley, for Arthur Browne & Co., Warrington.*

(1) (1913) 109 L. T. 192.
(2) [See also *Roe* v. *Roe* [1916] P. 163 ; *Phillips* v. *Phillips* [1917] P. 90.—J. R. B.]

J. R. B.

C. A.
1918
March 4.

[IN THE COURT OF APPEAL.]

In the Estate of JAMES RANKINE, Deceased.

Probate—Practice—Trust Disposition and Settlement—Testator domiciled in Scotland—Personal Property in Scotland and England—Confirmation of Executor in Scotland to Corporation—Application in England to seal Confirmation to same Corporation—Jurisdiction of English Court—Confirmation of Executors (Scotland) Act, 1858 (21 & 22 *Vict. c.* 56), *s.* 12.

By s. 12 of the Confirmation of Executors (Scotland) Act, 1858, "When any confirmation of the executor of a person who shall . . . . have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the Principal Court of Probate in England, and a copy thereof deposited with the registrar . . . . such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate":—

Held, that the language of the section was imperative and that the act of sealing a confirmation of the nomination of an executor by the English Court was a merely ministerial act as to which the Court had no discretion to order or refuse.

Where, therefore, under a trust disposition and settlement a corporation aggregate had been appointed executor and confirmation of the nomination of the executor had been granted by the Scottish Court to the corporation, it was held, on an application under s. 12 of the Act by the corporation to have the confirmation sealed by the English Probate Court, that the corporation was entitled as of right to the order asked, notwithstanding that it was contrary to the practice of the English Probate Court to grant letters of administration with the will annexed to a corporation, except to a syndic who had been duly appointed by such corporation to take the grant.

Decision of Coleridge J. reversed.

Appeal from Coleridge J. sitting as a judge of the Probate Division.

James Rankine, late of Edinburgh, died there on June 15, 1917, domiciled and resident in Scotland. By his trust disposition and settlement (or will), dated March 31, 1906, and recorded in the Court books of the Commissariat of Edinburgh on October 4, 1917, he

appointed, in the events which happened, the Royal Exchange Assurance, London, to be his executor. On October 5, 1917, confirmation of the nomination of executor contained in the trust disposition and settlement was granted by the Sheriff of the Lothians and Peebles to the corporation, and they were given full power to administer the estate. The confirmation recited (inter alia) that the secretary of and on behalf of the corporation had given on oath an inventory of the personal estate of the said James Rankine at the time of his death situated in Scotland and England amounting in value to 15,130*l.* 1*s.* 4*d.*

On October 18, 1917, the confirmation of the grant made by the Scottish Court in favour of the corporation was presented to the Principal Registry of the Probate Division of the High Court at Somerset House for sealing. The papers were accepted, but were subsequently returned to the solicitor who had lodged them with an intimation that the Court refused to seal them on the ground that it was not the practice to seal to a corporation, but that the Court was prepared to seal to a syndic duly appointed by the corporation.

On January 14, 1918, the corporation moved before Coleridge J. in the Probate Division, under s. 12 of the Confirmation of Executors (Scotland) Act, 1858, for an order that the confirmation might be sealed to them without the intervention of any syndic. On January 21 his Lordship delivered a considered judgment in which he held that the section only applied where the confirmation was granted to a person who was competent according to English law to take probate, and that by English law a corporation could not do so, but could only take administration with the will annexed to a syndic appointed by the corporation to take the grant. He accordingly refused the application.

The corporation appealed. The appeal was heard on March 4, 1918.

Sir Ernest Pollock, K.C., and *Le Bas*, for the appellant corporation. The matter of sealing a confirmation of an executor granted by the Scottish Court is now entirely governed by statute. By s. 12 of the Confirmation of Executors (Scotland) Act, 1858, it is provided that on production to the Court of Probate in England (now the Probate

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Division) of a confirmation and the deposit of a copy thereof with the registrar "such confirmation shall be sealed with the seal of the said Court." The words of the section are imperative. No discretion is given to the Court to refuse to seal a confirmation and the act of sealing is treated as a purely ministerial act. Sect. 15, which deals with the payment of the stamp duties chargeable on probates and letters of administration and on inventories respectively, indicates the purpose for which the statute was passed. In Scotland it is the common practice to appoint a corporation an executor. In England formerly a corporation could not be an executor or administrator, the reason, as stated by Blackstone, being that it could not take an oath for the due execution of the office : 1 Bl. Com., p. 477. The most recent case which deals with the practice is *In the Goods of Darke.* (1) There a corporation aggregate had been appointed executors of a will, and the Court, on motion, granted letters of administration, with the will annexed, to a syndic who had been duly appointed by the corporation to take the grant. That practice has been followed up to the present time.

[SWINFEN EADY L.J. referred to *In the Goods of the Duchess d'Orléans.* (2)]

That case raised an entirely different point. The question there was whether the Court would grant letters of administration to a minor, who was lawfully appointed according to the law of the testatrix's domicil. In *In the Goods of Hunt* (3) the question was as to the suretyship under the administration bond. There a limited company were appointed executors and trustees under a will; the Court granted administration with the will annexed to the general manager of the company as their nominee, and accepted the company themselves as the sole surety under the administration bond.

This matter being non-contentious business, there is no opposition.

SWINFEN EADY L.J. This is an appeal from an order of Coleridge J., sitting in the Probate Division, refusing an application made under the Confirmation of Executors (Scotland) Act, 1858, that there might be sealed in England a confirmation of a Scottish trust disposition and settlement.

(1) (1859) 1 Sw. & Tr. 516. (2) (1859) 1 Sw. & Tr. 253.
(3) [1896] P. 288.

James Rankine was a domiciled Scotchman, and, at the time of his death, had property both in Scotland and England. On October 5, 1917, confirmation of his trust disposition and settlement was granted in Scotland to the Royal Exchange Assurance. The corporation was incorporated by Royal charter on June 22, 1720, and since that date it has been, and is now, regulated by certain Acts of Parliament. It is within the powers of the corporation to act as executor, and the corporation having been appointed executor by the trust disposition and settlement of James Rankine, the Scottish Court confirmed its nomination. Shortly afterwards that confirmation was presented to the Probate Division here to be sealed in England.

Coleridge J. declined to give directions for the seal to be affixed in England on the ground that in England a corporation would not be a competent person to take a grant of probate or administration and that the Act must be interpreted as only requiring the Court in England to affix the seal to a confirmation in Scotland where the person making the application was a person competent according to English law to take a grant of probate.

In my opinion that view cannot be maintained. The object of the Act was to enable a Scottish confirmation to be given an extended operation over all parts of the United Kingdom; and the act of the Probate Division in England in affixing its seal is a ministerial act which the Court is by the statute required to perform, and not an act as to which it is left to the discretion of the Court whether it will or will not perform it. The Act is intituled "An Act to amend the law relating to the confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation, and of grants of probate and administration." Then the preamble to the Act (since repealed) recited: "Whereas it is expedient to amend the law relating to the confirmation of executors in Scotland, and to extend over the United Kingdom the effect of such confirmation, and of grants of probate and administration." The first provision to which I need refer is s. 9, which is in these terms: "It shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: . . . . Provided that the

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value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom." The provisions of s. 9 have been complied with in this case because in the confirmation the commissary finds that the deceased was domiciled in Scotland and certifies that there has been given upon oath an inventory of the personal estate of the said deceased at the time of his death situated in Scotland and England. Sect. 12 is the next material section, and it is upon that section that the present question turns: "When any confirmation of the executor of a person who shall . . . . have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England"—that is the case here—"shall be produced in the Principal Court of Probate in England, and a copy thereof deposited with the registrar . . . . such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate." The words "shall be sealed with the seal of the said Court" are not such as to vest any discretion in the Court; the language is imperative. The language of that statute renders it compulsory on the Court to seal the confirmation, and it differs from the language of the Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), dealing with the sealing in this country or probates granted in those British possessions to which the Act applies, where a discretion is vested in the Court. By s. 2, sub-s. 1, of that Act it is provided that "Where a Court of Probate in a British possession to which this Act applies has granted probate of letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court." There is a difference between the language of that section and that of the section now under consideration.

The Court is not dealing here with any question of making an original grant of probate or letters of administration. In *In the Goods of the Duchess d'Orléans* (1) the Court was asked to make a grant of letters of administration to a minor in respect of the estate of the late Duchess, who was domiciled in France, and it was there held that the Court would not follow the grant of the country of domicil when it would, by so doing, be acting in contravention to the law of this country. The application there was to make a grant to a minor, and such a grant is not made by English law. Nor in England is a grant of probate or letters of administration made directly to a corporation aggregate. The practice was pointed out in *In the Goods of Darke.* (2) In that case, by reason of the fact that the corporation could not take the oath for the due execution of the office of executor, the corporation could not, as such, take a grant of probate; but upon the corporation appointing their syndic for the purpose of taking the grant, the grant of letters of administration was made to the syndic. A similar practice was followed in *In the Goods of Hunt* (3), where an English limited company had been appointed executor and trustee of the will and the grant of letters of administration with the will annexed was made to the general manager of that company, the company being permitted to be the sole surety under the administration bond. On the present application no oath is required.

I am of opinion for the reasons already given that the view taken by the learned judge below was erroneous and that the Royal Exchange Assurance is entitled as of right to have the seal of the Court affixed to the confirmation. The appeal must be allowed and the confirmation sealed.

BANKES L.J. I agree The language of s. 12 appears to me to be quite plain, and, as I read it, it directs the doing of certain things of a mere ministerial kind. Under these circumstances I think the view taken by Coleridge J. was not correct.

EVE J. I agree.

Appeal allowed.

Solicitor for appellants: *Shirley W. Wolmer.*

(1) 1 Sw. & Tr. 253. (2) 1 Sw. & Tr. 516.

(3) [1896] P. 288.

W. I. C.

1918
March 13.

BARFORD *v.* BARFORD AND McLEOD.

Practice—Foreign Marriage—Uruguay—Evidence of Validity.

Petition for the dissolution of a marriage celebrated in Monte Video in the Republic of Uruguay. No lawyer practising in Uruguay could be found in England; the Court accepted, to prove the legality of the marriage, the evidence of a Doctor of Law who had been called to the Bars of England, Madrid, and three Spanish-speaking countries in South America. He was by virtue of a treaty entitled on application to a diploma permitting him to practise in Uruguay, and had for some years been studying and advising on the laws of Spanish-speaking countries.

THE petitioner in this case was an Englishman domiciled in England. He married in 1905 an Englishwoman resident in Monte Video. The marriage was celebrated in the British church in Monte Video and was followed by a civil marriage before an official, which alone was valid by the laws of Uruguay. In proof of the marriage the petitioner produced a marriage book, as it was called, which was given to him by the official, containing a record of the civil marriage and spaces for the entry of the births of any children of the marriage, which had been duly filled up. He also produced a certificate of the ecclesiastical marriage. His petition was for dissolution of the marriage on the ground of his wife's adultery, which was not denied.

Le Bas, for the petitioner, said that no lawyer practising in Uruguay could be found in England, and asked leave to call Dr. Benjamin Barrios, C.B.E., who stated that he had been called to the Bar of Mexico in 1899, of Madrid in 1911, England in 1912, Bolivia in 1913, and Peru in 1913, and that by the Treaty of Monte Video of February 4, 1889, persons who had been called to the Bar in any of the five countries of Peru, Bolivia, Uruguay, Paraguay, and the Argentine were entitled to apply for and have granted to them as of course, on paying certain fees, diplomas entitling them to practise in any or all of the said five countries. He had not applied for a diploma for Uruguay, but had studied for twenty years the laws of Spanish-speaking countries and been advising on such laws for the

last ten years. Counsel cited *Cooper-King* v. *Cooper-King* (1) and *Wilson* v. *Wilson.* (2)

Tyndale, for the respondent.

Bayford, for the co-respondent.

HORRIDGE J. said he thought that on those authorities he could admit the evidence.

Dr. Barrios then gave evidence that the marriage book showed that a legal marriage took place between the petitioner and the respondent, and would, either with or without the accompanying certificate of the ecclesiastical marriage, be accepted in the Courts of Uruguay as evidence of a legal marriage.

HORRIDGE J. pronounced a decree nisi.

Solicitors for petitioner: *Woodham Smith & Borradaile, for J. A. Morris Bew, Chichester.*

Solicitors for respondent: *Downing, Handcock, Middleton & Lewis.*

Solicitors for co-respondent: *Janson, Cobb, Pearson & Co.*

(1) [1900] P. 65. (2) [1903] P. 157.

J. R. B.

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March 8, 11, 25.

[IN THE COURT OF APPEAL.]

THE PENRITH CASTLE.

[1916, No. 598.]

Admiralty—Collision—Pilotage—Defence of the Realm (Consolidation) Regulations, 1914, *reg.* 36—*Portsmouth Public Traffic Regulations*, 1915—*Responsibility for Pilot's Negligence.*

Reg. 36 of the Defence of the Realm (Consolidation) Regulations, 1914, provides that: "If the master of a ship, or any other person, disobeys or neglects to observe any regulations relating to the navigation or mooring of ships in a harbour or the approaches thereto, or any signals from, or any orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to such navigation or mooring, he shall be guilty of an offence against these regulations."

Under clause 11 of the Portsmouth Public Traffic Regulations, 1915, made under the Defence of the Realm Regulations, the movements of all merchant vessels within the defence area are subject to the directions of the King's Harbour-master, whose orders are to be immediately obeyed.

Under verbal instructions received from the Chief Examination Officer, acting under the King's Harbour-master, one of the pilots specially licensed to conduct vessels in and out of the inner defence area of Portsmouth boarded the defendants' vessel in order to shift her out of the fairway into which she had dragged during a gale. The pilot took charge of her and brought her to another anchorage, where she gave the plaintiff's vessel a foul berth and a collision took place. The defendants pleaded, inter alia, that the pilot, if not in charge as a compulsory pilot, was not in charge as their servant, and that they were not liable for his negligence:—

Held, that it was not necessary for the order to shift to be in writing or given by the Examining Officer or King's Harbour-master in person; that not only under reg. 36, as held in the Court below, but also under clause 11, the master was bound to obey the orders of the duly authorized pilot; and that the defendants were not liable for his acts.

Decision of Hill J. [1917] P. 209 affirmed.

Appeal from a decision of Hill J. on an issue as to pilotage in an action of damage by collision.

On March 27, 1916, the defendants' steamship *Penrith Castle*, a

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vessel of 3663 tons gross, bound from London to Baltimore in water ballast, came to anchor in Ryde Roads. During the night, in heavy weather, she dragged her anchor, and on the following morning found herself in good anchorage ground but in the fairway. Accordingly one of the specially licensed pilots was sent by the Chief Examination Officer acting under the authority of the King's Harbour-master at Portsmouth to move her out of the fairway into a proper anchorage again. The pilot took charge of her to bring her to an anchorage, and the anchor was let go, but before she was safely brought up she collided with the plaintiffs' steamship *Drumcliffe*, a vessel of 4072 tons gross, lying at anchor in Ryde Roads.

The defendants pleaded inevitable accident and compulsory pilotage. At the hearing they further contended in the alternative that the pilot, if not in charge of the *Penrith Castle* as a compulsory pilot, was in charge of her under an order of the competent naval authorities made under the Defence of the Realm Regulations, and was not acting as a servant of the defendants so as to make them responsible for his negligence.

By clause 11 of the Portsmouth Public Traffic Regulations of June 15, 1915, issued by order of the Commander-in-Chief, Portsmouth, under the Defence of the Realm (Consolidation) Regulations, 1914, "the movement of all merchant vessels . . . . are subject to the direction of the King's Harbour-master, Portsmouth . . . . whose orders are to be immediately obeyed." By reg. 36 of the Defence of the Realm (Consolidation) Regulations, 1914, "If the master of a ship, or any other person, disobeys or neglects to observe any regulations relating to the navigation or mooring of ships in a harbour or the approaches thereto, or any signals from, or any orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to such navigation or mooring, he shall be guilty of an offence against these regulations."

Hill J. decided against the plea of inevitable accident, and on the question of pilotage held that there was nothing in any of the Portsmouth Public Traffic Regulations which put any compulsion upon the *Penrith Castle* to take a pilot; but that, although pilotage was not compulsory, the pilot took charge of the vessel by an order of the Chief Examination Officer given under the powers of the

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Defence of the Realm Regulations, and was in no sense the servant of the defendants, who accordingly were entitled to judgment.

The plaintiffs appealed.

March 8, 11. *Bateson, K.C.*, and *D. Stephens*, for the appellants. The decision that the Portsmouth Public Traffic Regulations do not make pilotage compulsory so as to afford the defendants the protection of s. 633 of the Merchant Shipping Act, 1894, is correct.

[*Laing, K.C.* The respondents do not propose to challenge the finding on that point.]

The sole remaining question is whether the pilot was entitled to supersede the master. No doubt the pilot was actually in charge, but the defendants have failed to prove that the master was compelled to give up charge, and the onus probandi is on them: *Clyde Navigation Co.* v. *Barclay*. (1) There is no proof that force would have been used if necessary to compel obedience to the orders. Reg. 36 of the Defence of the Realm Regulations has a penal consequence in the event of disobedience and must be construed strictly. The words "orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority" mean orders given by one of the persons named and not orders of any person—such as a pilot—deputed to pass them on. A pilot is not an "officer." An officer means a person holding His Majesty's commission. The order to shift should have been in writing, or, if verbal, should have been given by the examining officer himself. [*S.S. Beechgrove Co.* v. *Aktieselskabet Fjord of Kristiania* (2) and *The Mystery* (3) were referred to.]

Laing, K.C., and *John Bridge Aspinall*, for the respondents. In a place like the inner defence area of Portsmouth it would obviously be impossible for every order of the naval authorities to be in writing or given by the officer personally. Reg. 36 must be interpreted so as to include directions given by persons duly authorized by the examining officer. Under the order of the examining officer delivered through his deputy, the pilot was forced on the master of the *Penrith Castle*. Although he protested against his ship being moved he had to submit to the orders of the pilot. That brings the

(1) (1876) 1 App. Cas. 796. (2) [1916] 1 A. C. 364.
(3) [1902] P. 115.

case within the principle decided in *The Maria* (1), and the defendants are not liable for the pilot's negligence. [*The Halley* (2) and *The Ticonderoga* (3) were also referred to.]

D. Stephens replied.

Cur. adv. vult.

March 25. PICKFORD L.J. This case arises out of a collision between the *Penrith Castle* and the *Drumcliffe*, when the latter vessel was at anchor. The *Penrith Castle* had also been at anchor, and had dragged in a violent gale, in which many other vessels dragged. She had then brought up in the fairway within the inner defences at Portsmouth, and the naval authorities sent a pilot to shift her from there to an anchorage out of the fairway. The pilot was duly licensed by the Trinity House for the district, and was also one of the pilots specially licensed by the King's Harbour-master at Portsmouth to conduct ships in and out of the inner defence area at Portsmouth. These pilots have confidential instructions as to this area which are not disclosed to others.

On boarding the vessel the pilot in fact took charge and brought the vessel to another anchorage. Unfortunately she gave the *Drumcliffe* a foul berth, and a collision occurred. The only defence at first pleaded was inevitable accident. Afterwards, by amendment, a plea of compulsory pilotage was added, and at the hearing a further defence was raised that the pilot, although not in charge as a compulsory pilot, was not in charge as a servant of the owners for reasons afterwards to be explained.

Hill J. found that in fact the collision did not occur by inevitable accident, but by reason of the fault of the pilot alone, and this finding is not questioned. He held that pilotage was not compulsory, but that the *Penrith Castle* was being navigated by the pilot in pursuance of an order of the King's Harbour-master or some one delegated by him under the Defence of the Realm Regulations, and that therefore the owners of the *Penrith Castle* were not liable for the damage occasioned by the collision. The evidence was all taken before an examiner, some before the amendment was made in the pleadings and all before the point was taken on which Hill J. decided, and in

(1) (1839) 1 W. Rob. 95. (2) (1868) L. R. 2 P. C. 193.
(3) (1857) Swab. 215.

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consequence the facts are not so clearly brought out as would otherwise have been the case.

I think, however, it is proved that the pilot was one of the pilots with special instructions whom I have mentioned, that he received orders, which came from the Chief Examination Officer acting under the authority of the King's Harbour-master, to shift the vessel out of the fairway, and that he went on board for that purpose. The master of the *Penrith Castle*, in his evidence, stated that the pilot came on board and told him that by the orders of the Examination Officer he was going to move the vessel out of the fairway, that he objected that it was a wrong time to move her and that she was in good holding ground, but that the pilot said he was under orders from the naval authorities and must shift her, and took charge and did move her. The master further stated that he objected to the anchorage to which he was moved, but that the pilot did not attend to him. The pilot also gave evidence that he went on board by orders from the naval authorities, and that he took charge of the navigation of the vessel.

A proof of the evidence of Commander Williams, an officer on the staff of the captain of the dockyard and King's Harbour-master of Portsmouth, was put in at the trial, which showed that the pilot in shifting the ship was carrying out the orders of the King's Harbour-master given through the Chief Examination Officer. The master of the *Drumcliffe* also said that in that area a ship dare not move without permission.

The evidence, for the reasons I have already given, was not so clear as could be wished, but I think it is enough to show that the pilot went on board the *Penrith Castle* by the authority of the Harbour-master, who had entrusted to him the duty of moving the vessel, that he, in fact, took charge and moved her, and that by his fault the collision occurred. The question is whether the owners of the vessel are protected from liability.

In my opinion this depends upon the effect of the Defence of the Realm Regulations, 1914, Nos. 36, 37, and 39, and the regulations made under them called Notice to Mariners.—Portsmouth.—Public Traffic Regulations of the Defence Area, dated June 15, 1915. The relevant clauses in this Notice to Mariners are clauses 2 and 11. Clause 20 was also referred to, but in my opinion does not apply to

this case. Reg. 39 of the Defence of the Realm Regulations also does not apply to this case, as no order has been made by the authorities there mentioned.

It seems to me, however, that reg. 36 gives the power to the competent naval authority to issue regulations or give orders as to the navigation of ships in a harbour or the approaches thereto, and that clause 11 of the Notice to Mariners of June 15, 1915, issued by the King's Harbour-master at Portsmouth, is such a regulation for the movements of all merchant vessels within the inner defence area of the harbour of Portsmouth. The *Penrith Castle* was within this inner defence area.

By this regulation the movements of such vessels are to be under the direction of the King's Harbour-master. These words must, I think, be construed with regard to the subject-matter of the clause. There are no such words referring to assistants and deputies as are contained in some cases, e.g., the dock-master in *The Mystery* (1); but the inner defence area is a large place, and it cannot have been contemplated that directions should necessarily be given to every ship by the King's Harbour-master in person, and I think the words must be read as including directions given by persons properly authorized by him. In this case the directions were given by the special pilot, who, as I have said, was acting by his authority, and therefore I think that the master of the *Penrith Castle* was bound to obey his directions.

If this be so, then, according to the decisions in *The Halley* (2), *The Maria* (3), *The Ticonderoga* (4), and *S.S. Beechgrove Co.* v. *Aktieselskabet Fjord of Kristiania* (5), referred to by Hill J., the owners of the *Penrith Castle* are not liable for the acts of the pilot.

I do not think it necessary to consider whether the case also falls within reg. 37 of the Defence of the Realm Regulations.

The appeal, therefore, fails and must be dismissed with costs.

WARRINGTON L.J. On March 28, 1916, a collision occurred in Ryde Roads between the *Drumcliffe* and the *Penrith Castle*. The latter ship was at the time in charge of a duly qualified pilot, and

(1) [1902] P. 115.
(2) L. R. 2 P. C. 193, 202.
(3) 1 W. Rob. 95.
(4) Swab. 215.
(5) [1916] 1 A. C. 364.

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the collision occurred through the fault of the pilot in anchoring her at an improper place as regards the *Drumcliffe*.

The question is whether the owners of the *Penrith Castle* are liable for the default of the pilot. They would not be so liable if pilotage was compulsory so as to bring them within the provisions of s. 633 of the Merchant Shipping Act, 1894, and they accordingly contended before Hill J. that this was in fact the position. The learned judge decided against them on this point, and his view is not challenged in this Court.

But it was further contended, and this contention was adopted by Hill J., that, whether pilotage was compulsory or not, the pilot was in charge of the ship by order of the naval authorities, that this order was one they were entitled to give and the owners and master of the ship were bound by law to obey, and that accordingly the pilot was not acting as servant or agent of the owners so as to make them responsible in law for his negligence. On this ground Hill J. has given judgment for the *Penrith Castle*, and the plaintiffs appeal.

The question is partly one of law and partly one of fact. Was it competent to the proper naval authorities to order the pilot to take charge of the ship and to direct where she should be anchored, or was their power limited to directing the master to do certain things, including the anchoring of his ship in a particular part of the roads, leaving to him the detail, including the selection of the actual anchorage ?

The answer to this question depends on the construction of reg. 36 of the Defence of the Realm Regulations. Under this regulation a master is guilty of an offence if he disobeys any order, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to the navigation or mooring of his ship in a harbour or the approaches thereto. The locus in quo in the present case was included in the approaches to the harbour of Portsmouth. On the construction of this rule I have no doubt that an order requiring the master of a ship to allow the ship to be navigated and moored by a pilot designated for that purpose in the order would be an order relating to the navigation and mooring of the ship, and would be a valid order if given by the proper officer and in the proper manner.

There then arises the question of fact whether such an order was in fact so given. I think it is clear that the pilot conceived it to be his duty to take charge, and conveyed to the captain the impression that he was ordered to do so, involving an obligation on the captain's part to surrender the charge of the ship to him. But it is said there is no proof that such an order was in fact given by the proper officer or in the proper manner. I think on consideration that it was sufficiently proved that the order to the pilot to shift the ship, involving an order to take charge for the purpose, was given by the examining officer acting on the authority of the King's Harbour-master, the competent naval authority of the port. The evidence is not as precise as it might be, but I think it is sufficient. As I have said, an order to the pilot to take charge involves a corresponding order to the master to give him charge of the ship, and the only question that remains is whether that order was properly conveyed to the master through the pilot. It seems to me it was. Nothing is said in the regulations as to how a verbal order such as this is to be conveyed. A written order might, I think, clearly be sent by a third person as messenger, and I see no reason why a verbal order should not be so sent. In many cases to do so might be the only practicable way of conveying the order. Indeed, in the present case I expect it would not have been reasonably possible for the examining officer himself or another "officer" (whatever may be the meaning of the word), acting under the authority of the competent naval authority, to convey orders as to the shifting of a number of ships to the several captains concerned. On these grounds I agree with the judgment of Hill J.

I think it may also be supported on another ground, namely, that the order to the pilot to take charge given by the examining officer under the authority of the King's Harbour-master was a direction of the King's Harbour-master relative to the movement of a merchant vessel within the defence area of Portsmouth, and was therefore, pursuant to clause 11 of the Public Traffic Regulations, to be immediately obeyed.

For these reasons I think the appeal should be dismissed.

SCRUTTON L.J. While the steamship *Drumcliffe* was at anchor off Ryde Pier the steamship *Penrith Castle*, whose anchor had just

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been dropped near the *Drumcliffe*, dragged on to her. Hill J. has absolved the owners of the *Penrith Castle* from liability for the collision on the ground that the pilot directing the navigation of the *Penrith Castle* was not the servant of the owners, who are therefore not liable for his negligence. The owners of the *Drumcliffe* appeal.

There was no dispute that by the common law of England, as stated by the Privy Council in *The Halley* (1), shipowners are not liable for the negligence or unskilfulness of a person whom they are bound to receive on board their ship, in whose selection they have no voice, whom they have no power to remove or displace, and who, so far from being bound to receive their orders, is entitled to supersede and has in fact at the time of the collision superseded the authority of the master appointed by them. It is not necessary for us in this case to express an opinion whether s. 15 of the Pilotage Act, 1913, which came into force on January 1, 1918, has in the case of collisions occurring after that date altered the common law, for this collision occurred in March, 1916.

The first question is whether in Ryde Roads the master was under compulsion to obey the orders of a pilot under any circumstances; and the second question whether circumstances have been proved in this case which compelled him to obey orders which caused the collision.

The Defence of the Realm Consolidation Act, 1914, by s. 1 empowers His Majesty by Order in Council to issue regulations . . . . (*d*) "to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty, which regulations or any orders made thereunder affecting the pilotage of vessels may supersede any enactment, order, charter, by-law, regulation or provision as to pilotage." Under this power there were made regs. 36 and 37. [His Lordship read reg. 36.]

Reg. 37 reads as follows: "Every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty or Army Council, and shall obey any orders given, whether by way of signal or otherwise, by any officer in command of any of His Majesty's ships, or by any naval or military officer engaged in the defence of the coast.

(1) L. R. 2 P. C. 202.

"If any vessel fails to comply with any such regulations or to obey any such orders, the master or other person in command or charge of the vessel shall be guilty of an offence against these regulations, and if the vessel is at any time subsequently found at a port of, or within the territorial waters adjacent to, the United Kingdom, the competent naval or military authority may cause the vessel to be seized and detained.

"This regulation shall not apply to a vessel not being a British vessel where the non-compliance with the regulations or disobedience to the orders takes place on the high seas outside the territorial waters adjacent to the United Kingdom."

These regulations require, first, obedience to regulations, secondly, obedience to orders relating to navigation or mooring.

First, as to regulations; a set of regulations were issued relating to the Portsmouth defence area, which includes the locality in question, signed by the King's Harbour-master, Portsmouth, and issued by order of the Commander-in-Chief, Portsmouth. [His Lordship read clause 11.] As to this, Hill J. has held that, while it enables the Harbour-master to order the vessel to shift her anchorage, it does not compel the master to place his ship under the control of any one else. I do not follow this. The Harbour-master in a large port cannot personally direct all the movements of all the ships; he must, in my opinion, be able to delegate his authority, or to order that all directions given by his delegate or substitute shall be obeyed, and that no movement not directed by that delegate or substitute shall be carried out. It is inconceivable to me that in time of war merchant vessels should be allowed to move about and anchor at their own pleasure in one of the principal naval ports of the kingdom, where a collision with a warship or a stranding in or near the fairway might seriously imperil national interests. Apart from this regulation, the master of the ship is bound to obey any orders, whether verbal or written, of the competent naval or military authority of the harbour, or any examining or other officer acting under his authority, relating to navigation or mooring, and to obey any orders given by any military or naval officer engaged in the defence of the coast. It appears to me clear, as in the case of *The Mystery* (1),

(1) [1902] P. 115.

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that if such orders properly carried out result in damage the owners are not liable for them, for the person giving such orders is not their servant or under their control; on the contrary, they are bound to obey him. I am satisfied, therefore, that orders may be given to ships in Portsmouth Harbour which they are bound to obey, and for the consequences of which they are not responsible.

The second question is whether it was proved in this case that such orders were given. The position as to this is not very satisfactory, for at the time the captain of the *Penrith Castle* was examined the pleadings only denied the allegation that the damage was caused by the negligence of the servants of the owners, and did not allege the specific facts on which reliance is now placed. In January, 1917, the pleadings were by leave amended by adding a plea that the negligence was that of a compulsory pilot, after which the pilot was examined. I do not think on this occasion the distinction between compulsory pilotage and compulsory obedience to the orders of a third party was present to the minds of counsel examining. The point was, however, made at the trial without any application to recall any witness; each side, I think, took their chance of success on the evidence given, and on that we must deal with the case.

I mention, to put it aside as Hill J. has done, that reg. 39 allows the Admiralty, Army Council, or pilotage authority to make orders as to compulsory pilotage for any class of vessels, or particular vessel, as no order of this class appears to have been made by any of the authorities mentioned.

Now the facts in this case are as follows: In a heavy gale a number of ships moored at Ryde had dragged their anchors, and some of them, including the *Penrith Castle*, had come to anchorage in the fairway. Four special pilots, including Holmes, were in turn for pilotage work, and they received an order purporting to come from the Chief Examining Officer, though not coming directly from him. The order is stated by Holmes to be "to shift the ships back into the anchorage of Ryde out of the fairway." "We were ordered to clear up all the ships that were in that fairway." "It was the naval authorities who detailed us to move the vessels out of the fairway that were in the fairway." "Under orders from the naval examination officer to remove the ship to the proper anchorage." The repre-

sentative of the Harbour-master, familiar with the practice of the port, speaks of it as "an order to put the ship into another berth out of the fairway," given by the Chief Examination Officer, "acting on the authority given him by the King's Harbour-master." Holmes went to the captain and told him he had to be shifted into the Motherbank. "He told me (the captain) he had orders to shift me into the proper anchorage, as I was in the fairway." The captain did not want to move; he said he was in good holding ground and it was the wrong time; but Holmes said he was under orders from the naval authorities and must shift him. The navigation proceeded, Holmes giving the orders and the captain and crew obeying. When the pilot proposed to let go the anchor the captain asked to be moved a little further ahead, and Holmes said, "No; we shall get on the Motherbank," dropped the anchor, and the collision happened. As Holmes said, "The master had nothing to do with it, and did not know that I was there until I was on board."

I agree with the finding of fact of the judge below that this was an order to Holmes to move the ship and to the ship to obey Holmes, and not an order to the ship to move, leaving it to the master to settle how he moved the ship, Holmes only advising. I do not think it is really denied that the Harbour-master and his deputy, the Chief Examining Officer, had a right to order the *Penrith Castle* to move, to direct her how to move, and to fix the place at which she should moor. I gather it is admitted that if the examining officer had come on board and given the orders which Holmes gave, the orders must have been obeyed, and the owners of the *Penrith Castle* would be freed from liability. Under these circumstances, I think it makes no difference that the examining officer sent a deputy to transmit his general order to move and moor as directed, and to give the special orders or directions "to move the ship" only means to give orders as to the anchors, engines, and steering, which must be obeyed.

For these reasons, there being a power in the Portsmouth Harbour-master to order the ship to move and direct her moving and mooring, in my opinion the facts proved show such directions or orders by the Harbour-master within reg. 37, or the examining officer within reg. 36, given through and by means of Holmes, as relieve the owners

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of the *Penrith Castle* from liability for the negligent order to move which caused the damage.

In my opinion the appeal fails.

Solicitors for plaintiffs (appellants): *Lightbound, Owen & Co.*

Solicitors for defendants (respondents): *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

E. C. T.

1917
Nov. 22, 23.
1918
Jan. 11.

ADMIRALTY.

(IN PRIZE.)

THE ANNIE JOHNSON; THE KRONPRINSESSAN MARGARETA.

[1916, Nos. 1155 and 1183.]

Prize Court—Cargo—Post-bellum Shipments—Sale—Passing of Property—C. & f. Contracts—Opening of Irrevocable Credits—Goods at Risk of Buyers—Municipal and Prize Law Principles—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 18, 19.

Under contracts of sale c. & f. Gothenburg, net cash against documents on arrival at Gothenburg and subject to the opening of a confirmed credit by the buyers through a Swedish bank, a number of bags of coffee, marked with the initials of the buyers, a Gothenburg firm, were shipped at Santos on two neutral vessels to be delivered according to the bills of lading, which were in the buyers' name, at Gothenburg. The letter confirming credit was sent by the Swedish bankers to the nominal shippers at Santos (the real shippers being the Santos branch of a Hamburg firm), the credits to be available on the shippers' sight drafts on the bank accompanied by bills of lading and invoices. The insurances were effected by the buyers, the drafts and documents were forwarded from Santos and presented to the Swedish bank for payment, but in each case this was effected after the date of the seizure of the goods as prize. The buyers alleged that the property had passed to them on shipment:—

Held, that, even if the right inference from the facts was that the contracts were made bona fide between two neutral firms, and the law to be applied was municipal law (which his Lordship did not accept), the property had not passed to the buyers before the seizure.

Held, further, that, according to prize law, if the real shippers were to be regarded as enemy traders, the goods would be treated

as enemy goods during transit; and if as neutral traders and the goods were destined for the use of, or to be at the disposal of, the Hamburg firm on arrival in Sweden, they would be treated as enemy goods whether the legal property according to municipal law remained in the shippers or not.

ACTION FOR CONDEMNATION OF CARGO.

Under bills of lading dated April 3 and May 10, 1916, and issued in the names of the buyers pursuant to contracts of sale c. & f. Gothenburg net cash on arrival of documents in Gothenburg and subject to a confirmed credit, 1000 bags of coffee marked with the buyers' initials were shipped in the name of the Companhia Nacional de Café by G. Trinks & Co., of Santos, the buying branch of a Hamburg house of the same name, on two Swedish vessels, the *Annie Johnson* and the *Kronprinsessan Margareta*, for delivery to the buyers and claimants, Peterssen & Nilsson, at Gothenburg. The claimants insured the goods, and, in accordance with a credit opened by their bankers and confirmed by letter and telegram to the shippers' bankers at Santos, when the documents arrived at Gothenburg payment was duly made. Meanwhile, in each case the goods in question, together with a number of other consignments of coffee from Trinks & Co. to other consignees, had been seized as prize when the respective vessels put into British ports for examination. These other consignments were condemned as prize on various dates in July, August, and November, 1917, in conjunction with a number of others shipped by or on behalf of Trinks & Co. on eighteen different vessels.

1917. Nov. 22, 23. *R. A. Wright, K.C.*, for the claimants. The property in the goods passed to the claimants on shipment. Being c. & f. contracts, as soon as the goods were put on board they were at the claimants' risk, a circumstance which clearly points to it having been the intention of the parties that the property should pass at that time: see the recent decision of the Privy Council in *The Parchim*. (1) There was a complete appropriation to the contract when the goods were marked for shipment with the buyers' initials. There was no reservation of a jus disponendi by the sellers and the cases fall within s. 18, r. 1, of the Sale of Goods Act, 1893;

(1) [1918] A. C. 157.

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there was an unconditional contract for the sale of specific goods in a deliverable state, and it is therefore immaterial that the time of payment was postponed. In effect the claimants paid in advance; there was a confirmed and an irrevocable credit, and the subsequent payment after the dates of seizure was mere machinery. The obligation on the Swedish bank to pay as soon as the documents arrived was absolute. Even if the documents had never arrived, the bank would have had to pay within a reasonable time: *Fragano* v. *Long*. (1) If the property passed on shipment, then the fact that other consignments from Trinks & Co. on these two vessels have been condemned is immaterial, as the doctrine of infection would not apply. [*The Sorfareren* (2) was also referred to.]

Greer, K.C. (*Sir Frederick Smith*, *A.-G.*, *Stuart Bevan*, and *H. Hull* with him), for the Procurator-General. These goods were subject to infection from the time they were put on board. Trinks & Co. on the same vessels were the shippers of goods which have been condemned. The property in the condemned goods and in these goods was in Trinks & Co. according to prize law. If it be necessary to consider whether there was a transfer of the property at common law, it is clear that, until after the date of the seizure of the goods, the property was still in the shippers. *The Parchim* (3) was quite a different case; it related to an ante-bellum shipment; and in effect it was an f.o.b. sale, as the insurance had been effected by the sellers on account of the buyers before shipment, subject to an undertaking that the buyers would repay. In each case it is a question of fact whether it was the intention of the parties that the property should pass before actual delivery: see *Saks* v. *Tilley*. (4) In the present cases the circumstances as a whole show that the intention of the sellers was to secure payment by remaining the owners of the goods until the documents arrived at Gothenburg and were taken up by the bank. In *Shepherd* v. *Harrison* (5) the House of Lords pointed out that great weight was to be attached to the fact that the goods were to be forwarded to the sellers' agents and only to be delivered up against acceptance

(1) (1825) 4 B. & C. 219.
(2) (1915) 1 Br. & Col. P. C. 589.
(3) [1918] A. C. 157.
(4) (1915) 32 Times L. R. 148.
(5) (1871) L. R. 5 H. L. 116.

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of the bills of exchange: see also the judgment of Bramwell L.J. in *Mirabita* v. *Imperial Ottoman Bank.* (1)

[THE PRESIDENT (SIR SAMUEL EVANS). The strongest fact against you is that a credit was opened, an irrevocable credit.]

A confirmed credit only means that there are two parties, the bankers and the buyers, who have promised that payment will be made against the documents. It does not alter the intention of the parties.

Cur. adv. vult.

1918. Jan. 11. THE PRESIDENT (SIR SAMUEL EVANS). These are the two remaining claims last argued in the large batch of coffee cases, known as the "Trinks cases." About thirty-five different consignments have already been the subjects of adjudication.

Trinks & Co., of Santos, were the shippers in every instance, although they used various other names as aliases. The name they used for the two consignments now to be considered was "Companhia Nacional de Café." It was not disputed that the real shippers were Trinks & Co. The consignees were Peterssen & Nilsson, of Gothenburg.

The two cargoes consisted of 500 bags of coffee and one case of samples each, laden on the Swedish steamships *Annie Johnson* and *Kronprinsessan Margareta.*

Five hundred bags was the quantity usually sent to consignees according to the practice arranged and adopted between the Trinks firms in Hamburg and Santos. This appears from a letter from Trinks & Co., of Hamburg, to Trinks & Co., of Santos, of November 1, 1915. [His Lordship read a portion of the letter and referred to some intercepted cablegrams and to his previous judgments in other cases in which the Trinks firms and their nominees were concerned, and continued:]

Two main contentions were put forward by the claimants: (*a*) that they were a neutral firm which had honestly bought the coffee for Swedish consumption; and (*b*) that the property in it had passed to them as such, and that they had become the owners for all purposes before seizure; and accordingly that the coffee

(1) (1878) 3 Ex. D. 164.

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seized was neither subject to condemnation nor contaminated or rendered confiscable by the presence of other contraband goods in the ship according to the prize law doctrine of infection.

The Crown challenged both these contentions.

The contracts put forward in the two cases are similar in terms, and the cases as presented run on parallel lines. The contracts were made pursuant to negotiations carried on by "conversations, personally or by telephone," with Otto Gewalt, described as the local agent of the Companhia Nacional de Café, of Santos. As shown by the evidence, the so-called agency of Gewalt was a completely polluted channel. Confirmation sale notes from Gewalt were produced. The contracts were "cost and freight, Gothenburg"; the goods were described as "uninsured, to be covered by purchasers," and the terms as to payment were "Nett cash against documents on their arrival at Gothenburg to be telegraphically confirmed by a local bank through a bank in Santos."

Having stated the general character of the contracts alleged and relied on, some further particulars relating to them must now be given.

The first in date was that relating to the coffee on the *Kronprinsessan Margareta*. It bore date February 1. The *Annie Johnson* contract was February 9. But as the *Annie Johnson* sailed first, and the seizure of the goods upon her was also the earlier, I shall take first in order the claim to the goods laden on that vessel.

The "delivery period" stated in the contract note was "Shipment per s.s. *Annie Johnson* to load beginning of March." The goods were not in fact loaded till the next month. The bill of lading is dated April 3; the invoice April 4. The letter confirming credit covered the goods to be laden on both vessels. It was sent by the Skandinaviska Bank from Gothenburg on February 14 direct to the nominal shippers—Companhia Nacional de Café, Santos. The credits were to be available on the latter's sight drafts on the bank accompanied by bill of lading and invoice. Under each credit payment was to be effected against the first bill of lading presented to the Skandinaviska Bank, the remaining bills of lading to be furnished later. The credits were to be in force up to May 1, 1916, inclusive. The dates of loading, namely, the beginning of March and latter part of March, were both specified in the letter

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of credit. The insurances were effected by Peterssen & Nilsson in February. The drafts and documents were not sent to the Skandinaviska Bank, but (as was said) to the Enskilda Bank of Stockholm as agents for the shippers or their Santos bankers. They did not reach the latter until May 16, that is after the seizure, which was effected at Stornoway on May 12. They were presented to the Skandinaviska Bank on May 18, and payment was said to have been made on that date.

The corresponding particulars in the case of the *Kronprinsessan Margareta* were as follows: The contract was February 1, the delivery period being "expected to load in the latter half of March." The loading did not in fact take place till May. The bill of lading was dated May 10: the invoice May 11. The goods were seized at Stornoway on June 15. The drafts were not received by the shippers' bank till June 29, a fortnight after the seizure, and payment was alleged to have been made through the Skandinaviska Bank on July 3.

The evidence as to the dealings with the bills of lading and invoices and as to payment was by no means satisfactory.

[His Lordship dealt with the evidence at some length, and said that while the matter was not left free from doubt, he was willing to assume in favour of the claimants that one of the bills of lading and the invoice as well as the draft in each case came into the hands of the Enskilda Bank, and were presented to and taken up by the Skandinaviska Bank about May 18 and July 3.]

Great stress was laid by counsel for the claimants upon the opening of irrevocable credit by the letter of February 14. It is therefore desirable to look into the circumstances somewhat closely. In the first place, whatever the meaning and effect of the credit opening may be, it must be noted that, according to the evidence, payment was not made by the claimants' bank to the banking agents of the shippers in Europe until after the seizure in either case, but the payment was consistent with the express terms of the letter. The credit also was only to be in force until May 1 inclusive. It was argued for the claimants that the legal and business interpretation of this was that if shipment of the goods at Santos was made at any time up to or on May 1, the credit was irrevocable up to the presentation of the bill of lading, whenever

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that might be. Their counsel said that some evidence would be given about the commercial interpretation or usage in such cases, but none was adduced. Moreover, even if the letter of credit had the effect contended for, the shipment of the goods on the *Kronprinsessan Margareta* was entirely outside it, as it was not made till May 10. It was admitted that no application was made to have the credit extended. Apart from voluntary action on the part of the Skandinaviska Bank or their customer, this shipment therefore received no protection from the credit which had been opened.

If the goods had been loaded within the time specified in the contracts and letter of credit, the bills of lading and the goods would have reached Gothenburg in the ordinary course in good time before May 1. The voyage of the *Annie Johnson* to Stornoway took thirty-six days, and that of the *Kronprinsessan Margareta* (a faster motor ship) twenty-eight days. The voyage of four other vessels carrying Trinks' coffee from Brazil to ports in Scotland, like Kirkwall, Lerwick and Leith, averaged about thirty-six days. It would rather seem that the time of loading for the *Annie Johnson* and *Kronprinsessan Margareta* had been arranged roughly for their arrival at Gothenburg before May 1; and the bills of lading might, of course, have arrived earlier by mail steamers.

A few other facts are to be noted with regard to the transactions. Although the loading was effected from a month to six weeks later than the periods stipulated, the shippers rendered no explanation; nor did the alleged purchasers or Gewalt make any complaint of the delay, or indeed any inquiry at all about the goods. Was it tacitly or otherwise understood that whenever the coffee arrived it would be acceptable and accepted by those for whom it was destined?

Lastly, it is to be borne in mind that before the contracts now in question were made, many consignments of Trinks' coffee to a number of notorious nominal consignees and enemy intermediaries had been seized in the preceding two months of December and January. This indicated that further consignments to these persons would probably have precarious passages. When or how Peterssen & Nilsson first had business transactions with Trinks was not stated.

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In support of the contention that the property had passed to the claimants on shipment four points were urged, namely :—(1.) The insurance by the claimants; (2.) the confirmed credits; (3.) the issuing of the bills of lading to Peterssen & Nilsson as consignees; and (4.) the alleged appropriation of the goods by their being marked on shipment.

The fact has been noted—but I want to emphasize it—that these were post-bellum transactions. It is hardly necessary to say that the cases of *The Miramichi* (1) and *The Parchim* (2) related to ante-bellum contracts.

But I propose to deal with the claimants' contentions first, as if they related simply to the passing of the property under our municipal law. As has been pointed out in many earlier cases, and so recently in *The Parchim* (2), the questions of fact relating to the intention of the parties, which is the determining factor, often raise points of the finest distinction. The judgment delivered in the Privy Council in *The Parchim* (2) shows that the facts upon which the decision was founded were of a very special kind.

As to the first point relied upon for the claimants, namely, that the goods were at the risk of and were insured by the claimants, this, although a material consideration, is not decisive. *The Parchim* (2) and other authorities establish that. In the present case a reason for this provision exists. It has often been observed in this Court that shippers on the other side of the Atlantic found difficulties in insuring goods which might be contraband, and therefore stipulated that the insurances should be effected by Scandinavian consignees, partly or in the whole, with German companies or underwriters. In other cases we have seen that while marine risks policies were to be effected by the shippers, war risks were left to be insured against by the consignees.

As to the second point, the opening of the credit, I have stated the facts, and commented upon them. It is not necessary to decide the point, but on the whole, as a matter of construction, I am of opinion that the credit lapsed before the documents were presented, and this was after the seizures. I may say that I gather from many other similar cases that this is in accordance with the commercial interpretation. However that may be, it is clear, at any rate, that

(1) [1915] P. 71. (2) [1918] A. C. 157.

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the shippers did not and could not rely upon a credit in relation to the *Kronprinsessan Margareta* shipment on May 10 (unless they were very remiss in their business), because, on any construction, the period of credit had expired. I do not consider that the letter of credit was anything more than a guarantee given that the price of the goods would be paid on presentation of a bill of lading and invoice at Gothenburg. This circumstance does not, in my view, determine that the shippers abandoned the jus disponendi, or intended that the property in the goods should pass before or immediately upon shipment to the consignees named in the bills of lading. The instructions to the bank were express and specific that the documents should only be given up against payment at Gothenburg; and this, in fact, was what the claimants said was done.

As to the third point, I am of opinion that the issuing of the bills of lading to the claimants themselves did not effect a transfer of the property. The bills of lading were given on April 3 and May 10. The invoices were dated next day. The documents were said to have been sent to the sellers' bankers at Gothenburg on April 5 and May 12, but upon what dates the mails were dispatched was not proved.

Fourthly, it was contended that the goods were unconditionally appropriated by being marked for shipment. In my view, that contention is unsound. The claimants were not aware of, and certainly did not assent to, such an appropriation by the sellers. It was not proved that any notification whatever was given to the claimants of the appropriation or shipment. No evidence was adduced to show that the claimants had any knowledge that the goods were afloat or had been loaded until after the seizure. (As to notification of appropriation, see the observations of Lord Parker in *The Parchim.* (1))

Moreover, as the contracts were for coffee of specified description and quality to be shipped in specified periods in March, and the shipments were only made in April and May, it may well be that the claimants might have refused to accept them: cf. *Shand* v. *Bowes.* (2)

The conclusion to which I have come is that there was not an

(1) [1918] A. C. 157. (2) (1876) 1 Q. B. D. 470.

unconditional appropriation with the assent of the buyers, and that s. 18, r. 5, and s. 19, sub-ss. 1 and 3, of the Sale of Goods Act, 1893, apply. It is well known that these portions of the Act were founded on the judgment of Cotton L.J. in *Mirabita* v. *Imperial Ottoman Bank*. (1) I will quote one part of the judgment: "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (2); *Shepherd* v. *Harrison* (3); *Ogg* v. *Shuter*. (4) But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser."

I do not forget that the bill of lading in that case was made out to the shippers' order. But the paragraph just quoted does not appear to me to be confined to, or indeed to deal with, bills of lading so made out. The passage in the judgment which immediately precedes this dealt with the class of case where they are made out to the order of the shippers.

If, as was contended, delivery of the goods on the *Annie Johnson* and the *Kronprinsessan Margareta* to the masters of the vessels was a delivery to the consignees named in the bills of lading, then the shippers would on shipment lose their lien upon the goods. That being so, is it reasonable to suppose that they did not intend

(1) 3 Ex. D. 164, 172.
(2) (1851) 6 Ex. 543.
(3) L. R. 5 H. L. 116.
(4) (1875) 1 C. P. D. 47.

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to reserve a jus disponendi ? Without such a reservation, at any rate clearly in the case of the *Kronprinsessan Margareta*, they would have no security at all in respect of the goods other than the obligation of the alleged purchasers in Gothenburg under the contract.

Upon these grounds, even if the right inference from the facts should be that the contract was made bona fide between two neutral firms, and the law to be applied is the municipal law (which I do not accept), I should hold that the property had not passed to Peterssen & Nilsson before the seizure.

But there is another aspect of this case, and an important one, from the point of view of the rights of belligerents. In the judgment pronounced in some of the Trinks & Co.'s cases on August 28 last I stated some principles of prize law as to the transfer of property during a state of war, and the same subject was dealt with in the judgment given upon claims to various cargoes on the *Kronprinsessan Margareta* in March last. (1) Without repeating them, I will quite shortly give the effect of their application to the present case. If Trinks & Co., of Santos (shipping under the name of Companhia Nacional de Café), are to be regarded as enemy traders, the goods would be treated as enemy goods during transit, and claimants would not be regarded as the owners while the transit continued, or until the goods were actually delivered into their possession. Further, if the shippers are to be regarded as neutrals, and the goods were destined for the use of or to be at the disposition of Trinks & Co., of Hamburg, on arrival, they would be treated as enemy goods, whether the legal property according to municipal law remained in the shippers or not.

I have already in these cases stated the close connection and relationship between Trinks & Co., of Hamburg, and Trinks & Co., of Santos, according to the evidence, but without any assistance from either. They have interests in common, even if they are not identical. My view is that the Santos house was only a buying branch of the Hamburg house. The sole proprietor, who subscribed the whole of the capital for the Santos house or branch, was a partner in the Hamburg firm. Otto Gewalt, who purported to arrange the contract with Peterssen & Nilsson, was the agent

(1) [1917] P. 114.

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of the Hamburg firm. [His Lordship referred to some further facts, and continued:]

I cannot doubt that the claimants knew that the real shippers of the goods were Trinks & Co., of Santos. I cannot doubt either that they knew that Gewalt was acting through the Santos house of Trinks for Trinks & Co., of Hamburg.

The wholesome rule of the Court is that if any doubt exists as to the character of goods claimed to be the property of a neutral being still property belonging to an enemy, the claimant is put to strict proof of ownership; and any circumstances of fraud, or contrivance, or attempt at imposition on the Court—whether by making wrong statements, or by withholding information, or by self-imposed silence—will react unfavourably upon his claim: cf. *Batten* v. *Reg.* (1)

In this case the goods at the time of shipment were the property either of the Santos house or of the Hamburg house of Trinks. In dealing with the position in the other cases, I said that "where a person has interest in both an enemy and a neutral house of trade, and the transactions between the two are so mixed up as they are in these cases, the Court will not undertake itself to unravel the tangle. That is the duty of claimants; and if they fail in it they must suffer the consequences."

I think there is enough evidence in this case upon which to find that the Santos business was a mere agency or branch of the Hamburg house, and that before shipment the goods were the property of an enemy firm. The result then would be, according to the ruling of Prize Courts, that they would remain enemy property during transit, and be enemy property at the seizure.

But if they were the property of the Santos house as an entity distinct from the Hamburg firm, I should find that, having regard to the intimate connection between them, to the share held by Peter Trinks in both, and to the whole evidence, the Santos firm and Gewalt were acting in concert and in the interests of the Hamburg firm in the purchase and shipment of the coffee; and I should without hesitation apply the rule referred to, or extend it if need be, and decide that what was done was in fraud of the rights of belligerents; and that the property could not pass in

(1) (1857) 11 Moo. P. C. 271.

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transitu, and therefore remained in the shippers. They have made no claim. And in any event the goods would suffer under the doctrine of contagion from the presence on the ships of other condemned goods belonging to the same owners.

My conclusion is that the claimants have failed to establish that the goods were their property at the time of seizure, or that the alleged contracts were genuine contracts, or that their claim is made in good faith. I am satisfied that they, like so many of the other consignees, were mere intermediaries for Hamburg. Moreover, the real owners of the goods, whether the Santos house or the Hamburg firm, have put forward no claim; and the time for claiming has long run out.

Accordingly, the claim is not only disallowed, but I condemn the goods or their proceeds as good and lawful prize.

Solicitor for Procurator-General: *Treasury Solicitor.*
Solicitors for claimants: *Botterell & Roche.*

E. C. T.

C. A.

1918

March 11.

[IN THE COURT OF APPEAL.]

THE MICKLEHAM.

[1916, fo. 203.]

Admiralty—Collision—Pilotage—Abolition of Defence of Compulsory Pilotage—Notice to Mariners, No. 228 *of* 1916—*Defence of the Realm (Consolidation) Regulations,* 1914—*Ships to be "conducted" by duly licensed Pilots—Pilotage Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *ss.* 7 (*h*), 10, 14, 15, *and* 59—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.

Sect. 14 of the Pilotage Act, 1913, provides that "Notwithstanding anything in any Pilotage Order made under this Act, any area in which pilotage was not compulsory at the date of the passing of this Act shall be deemed to be an area in which pilotage is not compulsory for the purpose of determining the liability of the owner or master of a ship being navigated in the area for any loss or damage occasioned by or arising out of the navigation of such ship":—

Held, that the section refers only to areas and not to particular ships for which at the date of the passing of the Act pilotage was not compulsory, and that a vessel which, as a home-trading ship of less than 3500 tons, was exempt from the obligation to take

a pilot in the Downs, but under a Notice to Mariners (No. 228 of 1916) made under the Defence of the Realm (Consolidation) Regulations, 1914, had to be conducted by a pilot, was not deprived of the defence of compulsory pilotage provided by s. 633 of the Merchant Shipping Act, 1894.

Held, further, that where a regulation made under the Defence of the Realm Act provides that a vessel must be "conducted" by a pilot, it means that the pilot is compulsorily in charge of the navigation and not merely that the vessel has to be navigated under his advice.

Decision of Bargrave Deane J. in *The Nord* [1916] P. 53 approved.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Eirini;* the defendants were the owners of the steamship *Mickleham.* The collision took place on the evening of March 7, 1916, in the Downs. The *Eirini*, a Greek vessel of 2452 tons gross, was lying at anchor in the examination ground with her anchor lights duly exhibited when she was run into by the *Mickleham*, a British vessel of 370 tons gross, bound from London to Tréport with a general cargo. The defendants admitted that the collision was caused by the negligent navigation of the *Mickleham*, but pleaded that it was solely the negligence of the duly licensed pilot who was in charge of her by compulsion of law.

Clause 3 of an Admiralty Notice to Mariners (No. 228 of 1916) made under the Defence of the Realm (Consolidation) Regulations, 1914, provides that "All ships (with certain exceptions which did not apply to the *Mickleham*) whilst navigating in the waters from Gravesend to London Bridge or vice versa must be conducted by pilots licensed by the London Trinity House."

Hill J. decided that the *Mickleham* came within this Notice, and, on the authority of *The Nord* (1), that the pilot was compulsorily in charge of her and that the defendants were entitled to the protection afforded by s. 633 of the Merchant Shipping Act, 1894. He accordingly gave judgment for the defendants with costs

The plaintiffs appealed.

MacKinnon, K.C., and *D. Stephens*, for the appellants.

Laing, K.C., and *Balloch*, for the respondents.

[It was not contested by the appellants that, as decided in *The*

(1) [1916] P. 53.

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Nord (1), where a vessel has to be "conducted" by a pilot, the pilot is compulsorily in charge of the navigation, nor was it contested that under the Notice to Mariners, No. 228 of 1916, the *Mickleham* had to be conducted by a pilot, but it was argued that the effect of s. 14 of the Pilotage Act, 1913, was to deprive the defendants of the defence of compulsory pilotage given by s. 633 of the Merchant Shipping Act, 1894. The arguments and the sections of the Pilotage Act referred to are stated in the judgments.]

PICKFORD L.J. In this case damage was occasioned by a collision between the *Eirini* and the *Mickleham*, for which the *Mickleham* has been found not to be responsible.

The facts, so far as it is necessary to refer to them, I may state by reading the beginning of the judgment of Hill J.: "The *Mickleham* is a British ship of 370 tons gross. She was on a voyage from London to Tréport with cargo and no passengers. It is agreed that, but for the regulations under the Defence of the Realm Act, she would be exempt as a home-trading ship of less than 3500 tons gross and not carrying passengers. At the time of the collision the Regulations applicable are those contained in the Notice to Mariners, No. 228 of 1916. The collision was on March 7, 1916, in the Downs. It is not disputed that, if the Regulations apply, she was within an area to which they apply. She was still proceeding through the Downs Pilot Station."

Now it was not disputed before us either that, although an exempt ship apart from the Defence of the Realm Regulations, the *Mickleham* was a ship to which compulsory pilotage was applied by the Defence of the Realm Regulations, which have statutory force; but it was said that although pilotage was compulsory the defence of compulsory pilotage did not apply to her, and that she must be treated as being within what is called in the Act, to which I shall refer directly, a non-compulsory area. The learned judge also decided that although she was bound to Tréport she was bound to the Downs Pilot Station on the way, and on that point his judgment has not been questioned before us. He further said that he felt that he was bound by the decision of Bargrave Deane J. in the case of *The Nord*. (1) There seem to have been

(1) [1916] P. 53.

two points decided in *The Nord*. (1) One was that when the Regulations said certain ships must be conducted by pilots licensed by the London Trinity House that meant conducted by a pilot who is compulsorily in charge, and not merely navigated under the advice of that pilot. That point also has not been contested before us; and I am of opinion that the learned judge was quite right, and that a regulation having statutory force which provides that a ship is to be conducted by a pilot does not mean that she is to be navigated under his advice; it means that she must be conducted by him, and that makes pilotage compulsory.

The second point in *The Nord* (1), however, is a little difficult, and the real question argued before us is that, although the *Mickleham* was under compulsory pilotage in the sense that she had got to take a pilot and give up charge to the pilot, by reason of the Pilotage Act of 1913, she is not absolved from liability. The question turns almost entirely upon s. 14 of the Act. It is as well, however, to look also at ss. 7, 10, and 59. Sect. 7 provides that "the Board of Trade may, by order under this Act (in this Act referred to as a Pilotage Order)," amongst other things, "(*h*) provide that pilotage shall be compulsory in any area where it has previously not been compulsory, or provide, in connection with any rearrangement of a pilotage district, that pilotage shall be non-compulsory in any area where it has been compulsory, subject to provision being also made for the payment of compensation to the pilots concerned for any loss or damage which may be incurred by them in consequence of such rearrangement." Sect. 10 provides that, "Subject to the provisions of any Pilotage Order, pilotage shall continue to be compulsory in every pilotage district in which it was compulsory at the time of the passing of this Act, and shall continue not to be compulsory in every pilotage district in which it was not compulsory at the time of the passing of this Act, and subject to the provisions of this Act all exemptions from compulsory pilotage in force at the date of the passing of this Act shall cease to have effect." Then, having passed that section, for some reason which I do not quite understand the Legislature passed s. 59, which does not agree, so far as I can make out, with the abolition of exemption in the latter part of s. 10, because it provides, after giving the date

(1) [1916] P. 53.

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when the Act shall come into operation: "Provided that any enactment, order, charter, custom, bye-law, regulation, or provision with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act, including any exemptions from compulsory pilotage taking effect thereunder, shall remain in force notwithstanding anything in this Act or any repeal effected by this Act, until provision is made by Pilotage Order, or in the case of a bye-law by bye-law, made under this Act, superseding any such enactment, order, charter, custom, bye-law, regulation, or provision."

Thus, s. 10 having provided that the exemption shall cease, s. 59 provides that the exemption shall continue. I do not know that it is of much importance except that it indicates that ss. 10 and 59 together show that the fact of compulsion in a certain district is distinguished from the fact of compulsion upon a certain ship, and that it is contemplated that there may be a compulsory district with exemption for a certain ship. For what reason the word "area" is used in s. 7, and the word "district" in other sections throughout the Act except s. 14, I do not know, unless for the reason which counsel for the respondents gave—and he is probably correct—that there may be pilotage districts subject to the jurisdiction of the same pilotage authority having areas in them in some of which pilotage is compulsory and in some of which it is not; and it may be that the framers were using the word "district" for the whole district subject to the jurisdiction of the Commissioners, while they used the word "area" for what might be a sub-division of the district. That is very likely the reason for it. All these sections, however, show that they deal with compulsory areas and non-compulsory areas, and they speak of districts and areas as being districts and areas in which pilotage is compulsory, although there may be exemptions in them, and districts and areas in which pilotage is not compulsory, although, as has been pointed out, in the case of some ships, namely passenger ships, every district is compulsory. In these sections the phrase that pilotage is compulsory is used in the sense in which it has been used in very many cases decided in the Admiralty Court; and on this particular point the case of *The Johann Sverdrup* (1),

(1) (1886) 12 P. D. 43, 44, 45.

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with regard to pilotage in the Tyne, may be referred to. I notice that the then Master of the Rolls, Lord Esher, uses this expression: "Thus s. 16 abolishes compulsory pilotage in the Tyne"; Lindley L.J. says: "Therefore it is clear that compulsory pilotage was abolished in the Tyne after 1865"; and Lopes L.J. says: "If this is not the effect of s. 16, it can have no meaning, and I can have no doubt that it was intended to and does abolish compulsory pilotage in the Tyne." Of course, with regard to passenger ships there is still the exception in the Tyne, which shows that the question of particular vessels was not in the minds of the framers of this Act when they used the expression "area" or "district" in which pilotage is compulsory or not compulsory.

Sect. 14, which is the only section that really has any bearing on this matter, provides that, "Notwithstanding anything in any Pilotage Order made under this Act, any area in which pilotage was not compulsory at the date of the passing of this Act shall be deemed to be an area in which pilotage is not compulsory for the purpose of determining the liability of the owner or master of a ship being navigated in the area for any loss or damage occasioned by or arising out of the navigation of such ship." It may very well be, as was contended by the learned counsel for the respondents, that this section has reference to the provision which I have already read in s. 7 (*h*), and that the Legislature merely meant to deal with the case of a Pilotage Order made under the provision of s. 7 (*h*) and to provide that where by that sub-section a pilotage area has been made compulsory by a Pilotage Order the defence shall not apply. That is not the case here at all. If that be the proper construction—and I by no means say it is not—of course there is an end to the appellants' argument. It seems to me there is another conclusive answer to it. Whether the section has reference only to cases in which pilotage is made compulsory under a Pilotage Order or not, or whether it applies to pilotage being made compulsory by some other enactment, such as the Defence of the Realm Regulations, or not, the whole gist of the section is in making pilotage compulsory in an area in which it has before been not compulsory within the meaning of the clause I have mentioned; and taking away the exemption from a particular ship is not making pilotage compulsory in an area. I have already

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pointed out that exemptions are dealt with in this Act apart from the general provisions as to compulsion. The argument, as I understood it, was that all areas are compulsory for some ships. I do not think that is correct, using the words in the proper sense. There is no area or district which is compulsory for all ships. Therefore the argument comes to this, that pilotage is made compulsory in an area by taking away the exemption of a ship because thereby it is made an area in which pilotage is compulsory for that particular ship. I cannot say that I think that argument is sound. I think the section deals simply with a provision which may make an area in which pilotage was formerly not compulsory an area in which it is compulsory. It has no application at all to the case of taking an exemption from a ship.

I think the judgment of Hill J. is correct, and the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion.

The *Mickleham* at the date of the damage in question enjoyed an exemption from compulsory pilotage. There was in force at that time a regulation, No. 228, of the year 1916, which provides that all ships other than certain exempted ships—to which I need not refer—"whilst bound from and whilst navigating the waters of the Downs Pilot Station to Gravesend, or vice versa, must be conducted by pilots licensed by the London Trinity House." The *Mickleham* was at the date of the accident a ship coming within the description in that regulation, and it is admitted that she was affected by it, and was therefore bound to be conducted by a pilot. But it is said that, though she had to be conducted by a pilot, she is not entitled to rely on the defence of compulsory pilotage. The argument in support of that contention is founded on s. 14 of the Pilotage Act of 1913, and the question depends upon what is the true construction and effect of that section. In order to ascertain that it is necessary, I think, to look at one or two other provisions of the Act. The first of those which I think, although it comes after s. 14, the most convenient with regard to the section in question to look at is s. 15. I need not read it, but the effect of it is this, that the Act was about to abolish as from a future date, not the date on which the Act as a whole was to come into operation,

but five years later, the defence of compulsory pilotage. But in an earlier part of the Act, in s. 7, sub-s. (*h*), it was provided that the Board of Trade might by order, in the Act referred to as a Pilotage Order, amongst other things, provide that pilotage shall be compulsory in any area where it had previously not been compulsory. It seems to me that s. 14 was inserted in order to prevent the extension, during what I might call the suspensory period, of the area in respect of which compulsory pilotage might be applied. That is quite a sufficient explanation of the insertion of that section, and in my opinion that is the purpose for which the section is to be construed, and there seems to me to be no ground for giving the wider application to it which was contended for by the owners of the *Eirini*.

As to the other contention, namely, that the area in question was, so far as this ship is concerned, a non-compulsory area because she was entitled to an exemption, in my judgment that argument is not well founded. In my opinion there is nothing in this section which applies to particular ships. The section deals entirely and exclusively with areas in which pilotage is compulsory or not compulsory.

For these reasons I agree with the judgment of Hill J.

Scrutton L.J. I agree.

Solicitors for plaintiffs (appellants): *Holman, Fenwick & Willan.*
Solicitors for defendants (respondents): *Thomas Cooper & Co.*

E. C. T.

ADMIRALTY.

1918

March 26;
April 15.

THE ST. TUDNO.

[1917, No. 819.]

Admiralty—Ship—Forfeiture—Jurisdiction of Admiralty Court—Ship in Custody of Prize Court—Requisition by Lords Commissioners of the Admiralty—British Company under Enemy Control—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 76—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 51.

A ship registered as a British ship, and nominally owned by a duly registered British company, was in fact owned and controlled by the Hamburg-Amerika Line, of Hamburg, which, in the person of its nominees, owned all the shares in the British company and appointed its directors. Accordingly, after the outbreak of war with Germany, the ship was seized as prize, and on July 28, 1916, the Prize Court pronounced her to have belonged at the time of seizure to enemies of the Crown, and ordered her to be detained by the Marshal until further order ([1916] P. 291). Meanwhile on January 11, 1916, under Order XXIX. of the Prize Court Rules, the ship had been requisitioned by the Lords Commissioners of the Admiralty, and she remained in their possession. On April 5, 1917, the writ in the present action was issued claiming a declaration under the Merchant Shipping Acts, 1894 and 1906, that the ship was forfeited to the Crown on the ground that she was not entitled to be registered as a British ship:—

Held, that as the Lords Commissioners of the Admiralty had merely temporary possession of the ship and had to return her into the custody of the Prize Court, which had at some time to make a final decree either of condemnation or release, the Admiralty Court had no jurisdiction to entertain the forfeiture action and to make the usual order for appraisement and sale, and that the action must be dismissed.

Action for Forfeiture of a Ship.

The plaintiff was Edgar Bates, an officer of Customs and Excise and Registrar of Shipping at the port of Liverpool. The defendants were the owners of the steamship *St. Tudno*. The plaintiff claimed a declaration under s. 76 of the Merchant Shipping Act, 1894, and s. 51 of the Merchant Shipping Act, 1906, that the *St. Tudno* was not entitled to be registered as a British ship. Since October 3, 1913, the vessel had been registered at Liverpool in the name of the defendants, the MacIver Steamship Company, Limited, a duly registered British company, but the whole control of that company

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was in the Hamburg-Amerika Line, of Hamburg, which appointed the directors, and, in the person of its nominees, owned the entire share capital issued by the company. Accordingly, on December 24, 1915, the *St. Tudno* was seized as prize; a writ in prize was issued on January 3, 1916; and on July 28, 1916, the Prize Court pronounced the vessel to have belonged at the time of seizure to enemies of the Crown and ordered her to be detained by the Marshal until further order. (1) Meanwhile, on January 11, 1916, under Order XXIX. of the Prize Court Rules, the vessel had been requisitioned by the Lords Commissioners of the Admiralty, and she remained in their possession.

On December 18, 1916, it having appeared to the Commissioners of Customs and Excise that there was a doubt as to the title of the ship to be registered, the plaintiff, in accordance with the procedure prescribed by the Merchant Shipping Acts, gave the defendant company written notice to furnish satisfactory evidence within thirty days that the *St. Tudno* was entitled to be registered as a British ship. (2) Such evidence was not given, and on April 5, 1917, the writ in rem in the present action was issued. The statement of claim, after setting out that no satisfactory evidence of the title of the *St. Tudno* to be registered as a British ship had been given to the plaintiff, alleged that she was in the possession of the Lords Commissioners of the Admiralty, who held her "subject to the adjudication of this Honourable Court," and claimed a declaration that she was forfeited to His Majesty and an order for sale. The defendants denied that the vessel was not entitled to remain on the register, and further pleaded that by reason of the Prize Court proceedings, "in which it had been pronounced that the ship belonged to enemies of the Crown but was entitled to the benefit of the Sixth Hague Convention and accordingly was ordered to be detained until further order, the Admiralty Court had no jurisdiction to grant, or ought not to grant, the relief claimed."

(1) [1916] P. 291.

(2) The qualification for owning British ships is contained in s. 1 of the Merchant Shipping Act, 1894, which provides that "A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description." . . . . (*d*) "bodies corporate, established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions."

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March 26. *Sir Frederick Smith*, *A.-G.*, and *Giveen*, for the plaintiff. *C. R. Dunlop*, for the defendants.

[In view of the decision turning on the question of jurisdiction, the arguments directed to the question as to whether the vessel was entitled to be or to remain on the register and the material date to be looked at in an action for forfeiture—a question left open by the Court of Appeal in *The Polzeath* (1)—are omitted. The defendants submitted that to make a decree of forfeiture and an order for sale would be to stultify the detention order of the Prize Court and to anticipate the final decree, the form of which could only be determined after the war: *The Gutenfels*. (2) In support of the defendants' contention that the maxim "once in prize always in prize" applied, and that the Court had no jurisdiction to entertain the action, *The Corsican Prince* (3) and the cases there cited were referred to.]

April 15. HILL J. read the following judgment:—This is an action brought in the name of Mr. Edgar Bates, as officer of Customs at Liverpool, by a writ in rem to have it declared that the *St. Tudno* became and was forfeited, or that the ship be forfeited to His Majesty, and that the ship be sold by order of the Court. The claim is made under the Merchant Shipping Acts, s. 51 of 1906 and s. 76 of 1894, on the ground that the *St. Tudno* at all material times was registered as a British ship and was not entitled to be so registered.

The ship since October 3, 1912, has been registered in the name of the MacIver Steamship Company, Limited. Notices under s. 51 of the Merchant Shipping Act, 1906, requiring evidence to be given that the ship was entitled to be registered as a British ship were given on September 19 and on December 18, 1916. The plaintiff relies on the notice of December 18, 1916. Evidence was given by statutory declaration, and the Registrar of Shipping certified that the evidence was not given to his satisfaction that the ship was entitled to be registered as a British ship. The present action was then brought.

Counsel for the Crown, while desiring to keep open the question

(1) [1916] P. 241. (2) [1916] 2 A. C. 112.
(3) [1916] P. 195.

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whether it is sufficient merely to show that the Registrar was not satisfied, rested the claim upon the evidence before the Court. They asked the Court to find that the ship was not entitled to be registered as a British ship on the ground that the whole control of the MacIver Steamship Company, Limited, was in the Hamburg-Amerika Line, of Hamburg, and the principal place of business of the company was, therefore, in Hamburg, and upon the ground that the whole beneficial ownership in the ship was in the Hamburg-Amerika Line at the time the MacIver Steamship Company, Limited, was registered as owner and ever since.

It was agreed that the main facts were as stated in the judgment of the President in the case of the *St. Tudno* in prize (1), but the statutory declarations with their exhibits were also read. Counsel for the MacIver Steamship Company, Limited, was anxious to make it clear that, after the declaration of war, the remaining directors and officers of the company, and Messrs. D. & C. MacIver, who were the managers of the company, had kept the Admiralty fully informed of all the facts relating to the company and the ship. I have no doubt at all that that was so, and that Messrs. D. & C. MacIver acted throughout as became loyal British subjects.

This case is peculiar in that the *St. Tudno* has already been the subject of proceedings in prize. The judgment in prize would make the case in this Court easy of decision upon the merits, but the existence of the proceedings in prize raises difficulties as to the present jurisdiction of this Court which, to my mind, are not to be overcome.

By a decree made on July 28, 1916, the Prize Court pronounced the *St. Tudno* to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of his Majesty's Customs at the port of Southampton as good and lawful prize and as droits and perquisites of His Majesty in his office of admiralty, and thereupon, upon the application of the Attorney-General for the Crown, ordered the said ship to be detained by the Marshal until further order is issued by the Court. All questions of costs reserved. Liberty to apply.

This decree is final so far as it pronounced the *St. Tudno* to have belonged at the time of seizure to enemies of the Crown, and as such

(1) [1916] P. 291.

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to have been lawfully seized as prize, but it is interlocutory so far as it ordered the ship to be detained until further order. The defence in this action pleads that the Prize Court pronounced that the ship was entitled to the benefit of the Sixth Hague Convention. It did not. All that is involved in the decree is a recognition that the ship was one to which the terms of the Sixth Hague Convention applied, and that the question whether the ship should be given the benefit of the Convention cannot be determined at present and probably not until after the war. See *The Chile* (1) and *The Gutenfels.* (2) The ship is therefore ordered to be detained by the Marshal, i.e., kept in the custody of the Prize Court, until further order. The Prize Court has pronounced the ship to be enemy property, but has not yet determined what decree is to be made as the result of that decision. The decree finally determined that the *St. Tudno* was enemy property at the time of seizure, and, by recognizing that the ship was within the terms of the Sixth Hague Convention, it further, by necessary implication, found that she was enemy property at the outbreak of war and unable or not allowed to leave the British port within the days of grace.

It has therefore been determined by the Prize Court in a suit in prize against the *St. Tudno* that that vessel was the property of enemies of the Crown on December 24, 1915, when she was seized, and on August 4, 1914. Those are the facts upon which the decree proceeded, and those facts are either plainly stated upon the face of the decree or necessarily involved in it. Those facts cannot be questioned in any proceedings other than an appeal against the decree itself. They are binding upon me. But, as was the ownership on December 24, 1915, and on August 4, 1914, so it was at the date (whether September 19, 1916, or December 18, 1916) when the requisition for evidence was made ; and so it was when the Registrar decided that he was not satisfied, and also at the hearing before me ; and, as appears from the declaration of Mr. Henry MacIver and the exhibits thereto, so it was at the time the ship was first registered in the name of the MacIver Steamship Company on October 3, 1912.

Whatever, therefore, be the material time in a suit for forfeiture, whether the Court has to consider the ownership and the right to be registered at the date of registration or at the date of the inquiry

(1) [1914] P. 212. (2) [1916] 2 A. C. 112.

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by the Registrar of Shipping, or at the date of the writ or of the hearing of the action for forfeiture, the ship belonged to persons who during the war were enemies of the Crown, and who therefore cannot be, or have been, at any of the times mentioned, within any of the classes of persons entitled to own a British ship. Nor would it be material to consider whether the Prize Court found the legal or only the beneficial ownership to be in such persons. Even if it were only the beneficial ownership which was in the Hamburg-Amerika line, the ship would not be entitled to be registered as a British ship.

If, therefore, it be competent to this Court at this time to entertain this suit for forfeiture, I should have no hesitation in pronouncing a decree of forfeiture and in making the usual order for sale. But I cannot disregard the proceedings in prize, and, in order to determine whether it is competent to this Court to entertain this suit, it is necessary to consider the position of the ship under the prize proceedings.

I have examined the papers in those proceedings. The *St. Tudno* was seized as prize on December 24, 1915, and delivered up to the Marshal as the officer of the Prize Court. The writ in prize was issued on January 3, 1916, and served on the ship on January 4. Appearance was entered by the MacIver Steamship Company, Limited, as claimants, on January 8, 1916. On January 11, 1916, following an affidavit of Sir W. Graham Greene that the Lords Commissioners of the Admiralty desired to requisition the ship, an order was made under Order XXIX. of the Prize Court Rules (as amended April 29, 1915), upon a summons taken out by the Procurator-General. Earlier in the war the ship had been requisitioned as a British ship, and a charter in form T. 99 entered into. But following upon the seizure in prize the Crown now requisitioned under the Prize Court Rules. The order of the Prize Court made on January 11, 1916, was followed by an undertaking of the Procurator-General, pursuant to r. 6 of Order XXIX., which was filed on January 15, 1916. The ship has ever since remained in the hands of the Admiralty under that order.

The order of January 11, 1916, was an order for liberty to requisition, without appraisement. The undertaking of the Procurator-General recites that it has been made to appear to the President on behalf of the Crown that the said ship is required for the service of

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His Majesty forthwith, and that the Crown desires to requisition the said ship temporarily, and that the Court has made an order for the temporary delivery of the said ship to the Crown without appraisement, and that "the amount for which the Crown shall be considered liable in respect of the said requisition shall be the amount of damage, if any, which the said ship shall have suffered by reason of such temporary delivery as aforesaid."

The decree in prize already referred to was pronounced on July 28, 1916. The statement of claim in the present action states that the Lords Commissioners of the Admiralty hold the ship subject to the adjudication of this Court. I fail to see how that can be. They have actual possession of the ship only by temporary requisition from the Prize Court, and must return her into the custody of the Prize Court. In other words, they hold it subject to the adjudication of the Prize Court. The suit in prize is still pending. The ship remains subject to the Prize Court awaiting its final decree. In the present war no grant has been made by the Crown of any prize, and all prizes, whether by commissioned captors or others, are adjudged to and belong to the Crown. But that does not alter the jurisdiction of the Prize Court over all property seized as prize. The Prize Court has no more parted with its control of the res by giving temporary possession to the Crown than it did in former days when, between interlocutory and final decree, it gave possession, as it often did, to the captor. Such a "change of hands" does not affect the jurisdiction and control of the Prize Court over the res: *Smart* v. *Wolff* (1); *Home* v. *Earl Camden*. (2) The res remains under the jurisdiction and control of the Prize Court, and, unless the proceedings in prize are in the meantime discontinued by leave of the judge under Order VI., the Prize Court must at some time make a final decree either of release or of condemnation or otherwise as the circumstances may require. In making that decree, the Prize Court must have regard to prize, that is, international law.

Such being the position of the res, how can the Admiralty Court, administering the municipal law of this country, exercise jurisdiction over the res, while the res is still under the control of the Prize Court awaiting its final decree, and how can the machinery of ss. 51 and 76 be applied to such a res? Sect. 76 of the Act of 1894 provides that

(1) (1789) 3 T. R. 323, 341. (2) (1795) 2 H. Bl. 533, 542.

where a ship has become subject to forfeiture under Part I. of the Act, the officer of the Crown may seize and detain her and bring her for adjudication before the High Court. But, while the res is under the jurisdiction of the Prize Court, it is difficult to see how the officer could seize and detain the ship without subjecting himself to a monition from the Prize Court.

The proper method of bringing the ship for adjudication before this Court is by writ in rem and warrant for arrest by the Marshal. But it is equally difficult to see how a warrant of arrest could be obtained, or, if obtained, used to take the res out of the arrest of the Prize Court and put it into the arrest of this Court. It may be that these difficulties are got over by the fact that the MacIver Steamship Company, Limited, has appeared to the writ in rem. But, before any decree is made by this Court, I must still see whether this Court has any jurisdiction to make any decree in rem against a res which is in the custody of the Prize Court, and whether any decree which this Court could make could be enforced by it against such a res. I certainly cannot make the usual order that the vessel be appraised and sold and the proceeds paid into Court, such as was made in *The Polzeath*. (1) To do so would be to attempt to override the decree of the Prize Court, which has ordered the ship to be detained by the Marshal until further order of the Prize Court. To make a decree that the ship is or that it be forfeited to His Majesty is equally to deal with the res and to attempt to override the decree of the Prize Court.

In my judgment, so long as the res is in the Prize Court, awaiting the final decree of that Court, this Court has no power to deal with the res. Ships ordered to be detained under a Chile form of order are in a very anomalous position, but it is a position which prevents this Court from entertaining a suit for forfeiture so long as the ship is still in the Prize Court. I therefore have no alternative but to dismiss the suit. As I hold that there were reasonable grounds for the suit, I do so without costs.

Solicitor for plaintiff: *The Solicitor for Customs and Excise.*
Solicitors for defendants: *Pritchard & Sons.*

(1) [1916] P. 241.

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Feb. 25, 26;
March 11, 12, 19, 20;
April 15.

ADMIRALTY.

(In Prize.)

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[1917, No. 1679.]

Prize Court—Seizure of Neutral Ship with Cargo of Enemy Origin—Coal from Belgian Collieries in German Occupation—Doctrines of Retaliation—Self-preservation—Measures to prevent Commodities reaching or leaving Enemy Countries—Inconvenience and Loss to Neutrals—Condemnation of Neutral Vessel for carrying Goods of Enemy Origin or Destination—Validity of Order in Council of February 16, 1917.

An Order in Council of February 16, 1917, after reciting that a German memorandum of February 1, 1917 (aimed at preventing all sea traffic with Great Britain and her allies) rendered it necessary for further measures to be adopted to prevent commodities of any kind reaching or leaving enemy countries, provided that vessels encountered at sea on their way to or from ports in neutral countries affording means of access to enemy territory would, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin, and that such goods would be subject to condemnation. The vessels carrying them would also be subject to condemnation unless they called at an appointed British or allied port for the examination of the cargo. No port or ports had in fact been appointed under this Order.

A Dutch steamship bound direct from Rotterdam to Stockholm, and her cargo of coal, the produce of Belgian collieries in German occupation, were seized as prize off the Dutch coast under the authority of this Order:—

Held: (*a*) That the Order was not contrary to the law of nations, and, having regard to all the circumstances, did not entail unreasonable consequences on neutrals. (*b*) That the fact that no British or allied port had been appointed at which the vessel might call for examination did not invalidate the Order; the proviso was a relaxation in favour of neutral shipowners who wished to show their bona fides, and was in no sense a condition precedent to the enforcement of the substantive part of the Order. (*c*) That the coal was of enemy origin within the meaning of the Order. (*d*) Accordingly, that the ship and cargo were subject to condemnation.

Action for Condemnation of a Neutral Vessel and her Cargo.

The *Leonora*, a Dutch steamship of 1155 tons gross, was cap-

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tured on August 16, 1917, by a British flotilla about fifteen miles to the west of Ymuiden, and was taken into Harwich. She was in the course of a voyage from Rotterdam to Stockholm with a cargo of coal, the produce of Belgian collieries in the occupation of Germany and sold by one of the German Government departments to the charterers of the *Leonora*, the G. & L. Beijer Import and Export A/B., of Stockholm. The coal, which was part of a total quantity of 40,000 tons, more than half of which had been delivered before the capture of the *Leonora*, was either sub-sold by the charterers to the Stockholm Gas and Electric Company or bought by the charterers as the agents of that company.

The capture and subsequent prize proceedings were made under the authority of an Order in Council of February 16, 1917, which provided as follows: "Whereas by an Order in Council, dated the 11th day of March, 1915, His Majesty was pleased to direct certain measures to be taken against the commerce of the enemy: And whereas the German Government has now issued a memorandum declaring that from February 1, 1917, all sea traffic will be prevented in certain zones therein described adjacent to Great Britain and France and Italy, and that neutral ships will navigate the said zones at their own risk: And whereas similar directions have been given by other enemy powers: And whereas the Orders embodied in the said memorandum are in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy: And whereas such proceedings on the part of the enemy render it necessary for His Majesty to adopt such further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for this purpose to subject to capture and condemnation vessels carrying goods with an enemy destination or of enemy origin unless they afford unto the forces of His Majesty and his allies ample opportunities of examining their cargoes, and also to subject such goods to condemnation: His Majesty is therefore pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this Order:—1. A vessel which is encountered at sea on her way to or from a port in any neutral

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country affording means of access to the enemy territory without calling at a port in British or allied territory, shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court. 2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in art. 1 shall arise. 3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation. 4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order. 5. This Order is supplemental to the Orders in Council of March 11, 1915, and January 10, 1917, for restricting the commerce of the enemy."

From an affidavit of the Assistant Librarian of the Foreign Office it appeared that no application has been made to His Majesty's Government for the appointment of a port of call for vessels trading between Holland and Denmark and Scandinavia. If such an application had been made, a convenient port, probably on the east coast, would have been appointed. Vessels diverted on the northern trade routes were usually sent to Kirkwall, Lerwick, or Stornaway, according to circumstances, but all vessels were free to call on their own initiative at any open port in the United Kingdom. In practice, vessels had called not only at all the principal commercial and coaling ports in the United Kingdom, but also at such less customary ports at Methil, Goole, King's Lynn, and Sharpness. If, subsequent to February 16, 1917, a vessel proceeding to or from a port in any neutral country affording means of access to enemy territory had, in fact, called at any port in the United Kingdom, her cargo would have been examined at that port.

The owners of the *Leonora*, the N. V. Stoomvaart Maatschappij Leonora, and the charterers, as owners of the cargo, claimed that

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the Order was illegal and invalid as against neutrals, and that neither the vessel nor the cargo could be condemned.

Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G., Greer, K.C., Clive Lawrence, and *Pearce Higgins,* for the Procurator-General. International law has admitted the doctrine of retaliation in order that crime may not at one and the same time be licensed and successful; and it is a commonplace that retaliation must affect neutrals: Vattel, 1st ed., vol. 2, p. 87. The degree of the act which may be justified under the head of retaliation is measured by the quality of the act to which it is a reply. If the circumstances which necessitate the retaliation are unusually grave the retaliation must be unusually drastic. It is well established that neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no good cause for retaliation arisen: *The Zamora* (1); *The Stigstad.* (2) The circumstances which called for the necessity of the Order, though infinitely graver, are comparable to those which existed at the time Sir W. Scott decided the case of *The Fox* (3); and that case is an authority in favour of the validity of the present Order. Sir W. Scott decided that there was nothing inconsistent with the law of nations in the Orders of 1807 and 1809 made by way of reprisal for Napoleon's Berlin and Milan Decrees (4): see also *The Snipe* (5), *The Speculation* (6), and *The Comet.* (7) A number of these cases, including *The Comet* (7), went on appeal to the Lords Commissioners of Appeals in Prize Cases (unreported, to be found only in Appeal Cases in Prize Causes, vol. 42). (8) In none of these cases does the validity of the British Orders in Council appear to have been questioned. In *The Huron* (p. 18) proceedings in prize

(1) [1916] 2 A. C. 77.
(2) [1916] P. 123.
(3) (1811) Edw. 311.
(4) These Orders in Council and the Berlin and Milan Decrees will be found in appendix D to Edwards' Reports.
(5) (1812) Edw. 381.
(6) (1810) Edw. 184.
(7) (1808) Edw. 32.
(8) NOTE. — These volumes, which will be found in the Admiralty Court library, only give the respective cases on appeal of the appellants and respondents, with the appendices and a note of the result indorsed on the appellants' case, without giving the reasons for the result.

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had been taken against an American vessel for sailing in ballast to Bordeaux and there loading a cargo for New Orleans. There was no effective blockade of Bordeaux at the time, and the reason given by the respondents for upholding the judgment of the Court below was that "there was most clear and satisfactory proof of conduct in violation of His Majesty's Orders in Council of 11th and 25th November 1807." Similar reasons were given in *The Fame* (p. 58) and *The Nymph* (p. 207): see also *The Othello* (p. 32). In all these cases the decree of condemnation was upheld. See also Mahan's History of Sea Power upon the French Revolution and Empire, vol. 2, p. 352, and Manning's Law of Nations, ch. 10; and, for a general statement of the principles of retaliation, Moore's International Law Digest, vol. 7, p. 186, and Oppenheim's International Law, 2nd ed., vol. 2, pp. 305 et seq.

In reply to the wholly illegal memorandum of the German Government, which threatens the very existence of this country, the Order is not unduly severe. Neutral nations as well as Prize Courts must consider the nature of the issues for the enforcement of which the war is being carried on: see the observation of Sir W. Scott in *The Maria* (1), and the opinions of Baron Pufendorf therein referred to. The distinction between rights conceded to a belligerent under the name of retaliation and rights conceded under the name of self-preservation is somewhat artificial. The principles overlap, and the doctrines which have been laid down defining what a State may do if its very existence be assailed are doctrines which might also be examined under the head of retaliation.

As regards the question whether the coal was of enemy origin within the meaning of the Order, the evidence shows that the occupation of Belgium is complete; the Belgians do not retain any control over their coal mines or any other property, and the output of the mines is as much German property as if the coal came direct from mines in Germany. The hostile or friendly character of goods is determined by the place from which they come: the produce of enemy soil is enemy property: *Thirty Hogsheads of Sugar* v. *Boyle* (2); and territory in enemy occupation is to be regarded as enemy territory: *The Gutenfels.* (3)

(1) (1799) 1 C. Rob. 340, 351. (2) (1815) 9 Cranch, 191.
(3) [1916] 2 A. C. 112.

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Sir Erle Richards, K.C. (*MacKinnon, K.C.*, and *Bisschop*, with him), for the shipowners. (1)

Leslie Scott, K.C. (*Balloch, Stuart Bevan*, and *Le Quesne* with him), for the cargo owners. (1)

As against neutrals the Order is invalid. A belligerent may be justified in carrying out reprisals against his enemy for a departure from the laws of war, but the legal rights of neutrals cannot be altered thereby, and if in carrying out the reprisal a neutral is injuriously affected he is entitled to full compensation. By the law of nations a neutral is entitled to trade freely with either belligerent; and a belligerent is not entitled to interfere with that trade unless it can be brought within certain well-defined exceptions, such as the carriage of contraband, breach of blockade, or unneutral service: see Manning's Law of Nations (1875), p. 395, and Wheaton's International Law, 5th ed., p. 714. The Order is equivalent in all its main provisions to a declaration of a blockade, but it fails to fulfil the valid requirements of a blockade, for, by the law of nations, neutral ports cannot be blockaded. There is nothing in the judgment of the Privy Council in *The Zamora* (2) to justify under the title of retaliation any new obligations on neutrals, and, even interpreted as the Crown seek to interpret the judgment, it is still necessary for the Crown to show that in adopting reprisals neutrals do not suffer "an undue degree of inconvenience." Detention is an inconvenience; confiscation is something more, and in using the word "inconvenience" it is obvious that the Privy Council were not contemplating the confiscation without compensation of a neutral vessel. Military necessity of an urgent kind may justify interference with neutral property, but it is always subject to full compensation: see, as regards the jus angariae, the authorities quoted at length in the argument in *The Zamora*. (3) The modification in the severity of the Order by the proviso as to calling at a British or allied port is no modification at all. It cannot be considered a reasonable requirement for a vessel in the position of the *Leonora*, in order to escape

(1) As the arguments of the respective counsel for the shipowners and cargo owners largely overlapped, and were in no sense antagonistic, they have been reported together.

(2) [1916] 2 A. C. 77.

(3) [1916] P. 27, 30.

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condemnation, to have practically to double the length of her voyage by crossing the North Sea strewn with mines in a zone in which it is well known that the German submarines sink all vessels at sight. Further, no port has been appointed under the Order, and there was therefore no duty on the *Leonora* to put into any British port at all. The appointment of a port for examination is a condition precedent without which the Order is inoperative. The fact that the proviso has been inserted shows that in the opinion of the Government the Order otherwise was so wide as to be unreasonable. If the conditions are to be enforced, the continuance of neutral traffic will be put an end to. The Order is unlimited in its area and would apply to vessels seized, e.g. in the Pacific Ocean, if sailing from a port which affords access to an enemy country. The whole policy of the Order is to compel neutral vessels to call at British ports and thereby to preserve trade with this country, a course which may be patriotic but is not a legitimate object of retaliation.

From the fourteenth century onwards, whether enemy goods on neutral vessels could be seized or not, as to which there has been a divergence of views at different times, the vessels themselves have always been free from condemnation: see Pratt's edition of Story's Notes on the Principles and Practice of Prize Courts, p. 92, *The Hoop* (1), and Westlake, part 2, pp. 147 et seq. The precedent of the British Orders of 1807 and 1809 and the decisions of Sir W. Scott thereon do not afford any authority for the validity of the present Order. All the cases decided by Sir W. Scott on the Orders then in force were concerned with vessels captured for breach of blockade: see, in addition to the cases already cited from Edwards' Reports, *The Exchange* (2), *The Mercurius* (3), *The Luna* (4), *The Elizabeth* (5), *The Arthur* (6), *The Mentor* (7), *The Courier* (8), *The Rose in Bloom* (9), *The Success.* (10) In *The Fox* (11) it was not argued before Sir W. Scott that the Orders were invalid as retaliatory

(1) (1799) 1 C. Rob. 196.
(2) (1808) Edw. 39.
(3) (1808) Edw. 53.
(4) (1810) Edw. 190.
(5) (1810) Edw. 198.
(6) (1810) Edw. 202.
(7) (1810) Edw. 207.
(8) (1810) Edw. 249.
(9) (1811) 1 Dods. 57.
(10) (1812) 1 Dods. 131.
(11) Edw. 311.

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Orders, and his mind was not directed to the question of an extension of the doctrine of retaliation such as involved in the present Order. None of the cases on appeal under the Order in Council of November, 1807, cited by the Attorney-General, show that the appellate tribunal decided the principle of retaliation or had any argument upon the principle addressed to them.

[THE PRESIDENT (SIR SAMUEL EVANS). There may have been some very good reason, namely, the expression of opinion of some of the members of the Privy Council elsewhere.]

All those cases were treated as cases of blockade. During the Napoleonic wars the United States claimed against this country and against France in respect of their vessels condemned under the British and French Orders, but as regards Great Britain the war of 1812 put an end to these outstanding matters. As against France, however, there was no such bar, and in 1831 compensation was made in the sum of $5,000,000 : see Wharton's International Law Digest (1887), vol. 2, p. 610. All foreign jurists regarded both the British and the French retaliatory Orders from 1807 to 1812 as improper extensions of the law of blockade : see, e.g., Klein's Laws of War, p. 844. The milder Order in Council of March 11, 1915, the validity of which was upheld in *The Stigstad* (1), inflicted no penalty on neutral shipowners beyond the temporary detention of their ships, but all the neutral nations protested against it. The Attorney-General claims that the infringement on neutral rights increases as the lawlessness of one of the belligerents increases, and that the doctrine of self-preservation gives a right to do anything for the success of the belligerent cause. Such contentions, if upheld, would put an end to international law altogether and would set aside all the protection which treaties have given to neutrals. As to the doctrine that the laws of war and neutrality may be overridden by necessity, see Westlake, 2nd ed., part 2, p. 127, and Phillimore's International Law, 3rd ed., vol. 3, p. 311. Neutrals are not concerned as to whether the recitals of the illegalities of the respective belligerents are true or false ; both sides make allegations of illegalities, and there is no tribunal to settle which is in the right. Admitting that weight must be attached to the argument that one belligerent cannot be compelled to carry on war at a disadvantage, and assuming

(1) [1916] P. 123.

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that neutral trade can be interfered with, it still cannot by the law of nations be penalized, and if neutrals are to be deprived of their property provision should have been made for compensation.

On the facts the coal was not of enemy origin. The evidence is that the Germans pay the Belgian colliery owners for the output of the mines. The mere fact of the enemy being in occupation of a country does not turn the traders of the country into enemy traders: see *The Gerasimo.* (1) The Order in Council refers only to goods coming from or destined for the enemy country.

Sir Frederick Smith, A.-G., and *Greer, K.C.*, in reply. There is no authority for the claimants' argument that they are not concerned as to whether the recitals of the illegalities of the opponents are true or false. On the contrary, the responsibility is thrown on neutrals of regulating their conduct in a proper way. "If one belligerent attempts to injure his enemy, by acts which violate the rights of neutrals, and if these neutrals offer no resistance to such violation, it cannot be expected that the other belligerent shall submit to be attacked in this manner without retaliating upon his enemy by similar measures" (Manning's Law of Nations, p. 430). Neutral carriers must be strictly impartial: *The Nereide* (2); and must not encourage those who commit gross breaches of the law by continuing to trade with them. An Order which is lawful as against the enemy is lawful as against the neutral. If the pressure put upon the enemy is justified, it follows that in order to exercise such pressure all the vessels and goods employed by neutrals in trading with the enemy should be brought to this country. The Order has been promulgated with the legitimate object, amongst others, of convincing neutrals that the consequences of trading with Germany will be not less costly, though absolutely humane, than if they comply with the German demands. Compensation under such circumstances, therefore, would be an absurdity. It would encourage the neutral to pursue his trade with the enemy with the knowledge that, if caught and the profitable adventure frustrated, he would still receive compensation at the hands of the opposing belligerent. As regards the contention that the Order is inoperative because no port for the examination of the *Leonora's* cargo has been appointed, the claimants cannot be heard to argue that the vessel

(1) (1857) 11 Moo. P. C. 88. (2) (1815) 9 Cranch, 388, 438.

would have gone to a British port had one been appointed, when they made no attempt to ascertain where they should go, and, as the evidence shows, had no intention of going to any British or allied port at all.

Cur. adv. vult.

1918. April 15. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—These prize proceedings relate to eight steamships with their cargoes, which were captured in August and September of last year, on voyages from Rotterdam to Stockholm, Gothenburg, and other Swedish ports. The cargoes consisted mainly of coal and coke. The *Leonora* and one other were Dutch vessels: the other six belonged to Sweden. The captures were all made under the authority, or assumed authority, of an Order in Council issued on February 16, 1917.

The Crown asked for condemnation of the ships and also of the cargoes, in accordance with the provisions of that Order.

The claimants, owners of the various ships and cargoes, contended that the Order in Council was illegal and invalid, and that the captures were therefore wrongful.

The issue thus raised was obviously one of supreme importance, not only as between the belligerents and neutrals, but also in its results upon the position of the belligerents themselves, and its possible effect upon the proximate, and indeed ultimate, fortunes of the war.

The same broad question arises in reference to all the captures; and possibly the decision in the first case may be sufficient to dispose of all the others; but there was no express agreement that it should be treated and accepted as a test case for the determination of the remaining ones.

The case of the steamship *Leonora* was the one in which the evidence was taken and the arguments heard, and to which this judgment directly applies. (1)

As the hearing proceeded the material facts became undisputed in substance. The following is a summary.

(1) NOTE.—The cases of the other seven ships and their cargoes came before the Court on May 10, 1918, when decrees of condemnation were made in each case.

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The *Leonora* was a Dutch steamer managed by one Jos. de Poorter, of Rotterdam. She was a vessel of 1155 tons gross register. She was chartered by a company called "G. & L. Beijer Import and Export A/B.," of Stockholm (which I shall call "Beijers"), for a voyage from Rotterdam to Stockholm at a freight of 40 kr. per metric ton. This was about ten times the amount of the ruling freight before the war. It was from 4/3 to 4/6 in July, 1914. She was loaded with about 1677 tons of coal; the total freight was 67,099 kr. In other words the freight for this small tramp steamer was about 3700*l.* for the voyage of about 830 miles as against a pre-war freight of about 375*l.* Beijers were the shippers, and the bill of lading, dated July 31, 1917, was made out to themselves or their assigns. The vessel was captured by a British cruiser on August 16 last in open waters some distance out from the Hook of Holland, and was taken first to Harwich and thence to the Thames. The coal was produced in Belgian collieries under the control of the German Government, and sold by a department of that Government in Brussels, called the Royal Imperial Coal Central Committee—or sometimes, more shortly, the Chief Coal Office—to Beijers. It was part of a total quantity of 40,000 tons sold under a contract said to have been entered into on April 4, 1917. More than half the total quantity appears to have been delivered before the capture of the *Leonora*, and about 1400 tons were laden on one of the other ships, the *Emma Fernstrom*, a Swedish vessel, captured a little later. The coal was either sub-sold by Beijers to the Stockholm Gas and Electricity Company, or bought by Beijers for them as their agents, upon a commission of 4 per cent. The price had to be paid to the German department—the Brussels Chief Coal Office—when the coal was placed on truck at the mine. It was carried by rail from the mine to Antwerp, and by water from Antwerp to Rotterdam. Both Beijers and the Stockholm Gas and Electricity Company claimed, in the alternative, as the owners of the coal. No point was made on behalf of the Crown about the ownership or form of the claim. It is immaterial, therefore, which of the alternative claimants were the owners of the cargo.

When I come to deal with the argument of the claimants' counsel that the coal seized was not "of enemy origin" (within the meaning of that phrase in the Order in Council) it will be necessary to go

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more fully into the facts relating to the German occupation of Belgian territory (which comprised the district where the mines from which the coal was produced were situate), and to the control exercised by the German Government over such territory, and the industries located therein. At this stage it is sufficient to note two matters in connection with the contract for the sale of the coal by the German department to Beijers, and the contract between Beijers and the Stockholm Company. In the latter, which was first in order of time, Beijers reserved to themselves the right of rescinding the contract without compensation for damages, or of making such alterations in the price, mode, and times of delivery as might be occasioned by measures, restrictions, or the like, introduced by "the authority in the country of production or exportation." In the contract between the German department and Beijers it was stipulated that the prices were liable to any contingent alteration imposed "by our Government" which would be communicated to Beijers as soon as it was notified to the department in Brussels; in which event Beijers would have the right, so long as the coal had not left the mines, to withdraw from the contract if they informed the Brussels department by telegraph to that effect immediately on receipt of the latter's communication. This contract also contained the following clause: "We (i.e., the German Coal Department at Brussels) must also reserve our right to send you (i.e., Beijers) certain deliveries for Swedish customers who are in the interest of the German Empire, and must therefore be put by you in the first rank, that is, before you satisfy the wishes of your other customers."

The case for the Crown may be translated into quite simple terms. It was that the *Leonora* was carrying goods of enemy origin from a port in a neutral country affording means of access to the enemy territory to a port in a neutral country also affording means of access to the enemy territory, and was therefore liable to capture and condemnation in respect of the carriage of such goods under the Order in Council of February 16, 1917, and that the goods were also liable to condemnation under the same Order.

The answer of the claimants was: The order was illegal and invalid as against neutrals; and therefore the capture was wrongful, and neither the vessel nor the goods could be condemned.

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While the main contentions may be so succinctly stated, the arguments in support of them covered a wide area in the domain of international law, and were formulated and developed with learning, skill, and amplitude on both sides.

Before approaching the question of the construction, effect, and validity of the Order in Council, it is in my view essential to examine and keep in mind the circumstances, exceptional and, indeed, unique in their character, which led up to its promulgation. Its basis was retaliation, and its object was the restriction of the commerce of the enemy. It was intended to be, and was by its express terms stated to be, supplemental to an earlier Order in Council of March 11, 1915, which was similarly based, and had the same object. It is therefore necessary to go back to ascertain the origin and operation of the first Order.

In the first week of February, 1915—I think on February 4—the German Government issued an official declaration that the English Channel, the north and west coasts of France, and all the waters round the British Isles would be treated as a " war area," and that all enemy ships, whatever their character, found in that area would be destroyed, and neutral vessels would be exposed to danger. Even before this the enemy had shown how they were prepared to treat vessels belonging to their adversaries, whatever the class or mission of such vessels might be. Near the end of October, 1914, a German torpedo had sunk a French passenger steamer—the *Amiral Ganteaume*—with more than two thousand unarmed refugees on board, including a large proportion of women and children. By good fortune a British steamship happening to be near succeeded in rescuing most of the passengers ; but a considerable number lost their lives.

The declaration by Germany of the " war area " already referred to was communicated by this country to all the important neutral countries (including, of course, Holland and Sweden) in a Note dated March 1, 1915. The Note commented upon the declaration, and also foreshadowed the retaliatory measures which would be adopted, and were afterwards incorporated in the Order in Council of March 11, 1915.

The British Note of March 1, 1915, was presented to the Governments of Argentina, Brazil, Chile, Denmark, Greece, Italy, the

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Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United States, and Uruguay. It ran as follows :—

" Germany has declared that the English Channel, the north and west coasts of France, and the waters round the British Isles are a 'war area,' and has officially notified that 'all enemy ships found in that area will be destroyed, and that neutral vessels may be exposed to danger.' This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft in these waters, this attack can only be delivered by submarine agency. The law and customs of nations in regard to attacks on commerce have always presumed that the first duty of the captor of a merchant vessel is to bring it before a Prize Court, where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes. The sinking of prizes is in itself a questionable act, to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew and passengers (if there are passengers on board). The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo, and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent. It is upon this basis that all previous discussions of the law for regulating warfare at sea have proceeded.

" A German submarine, however, fulfils none of these obligations. She enjoys no local command of the waters in which she operates. She does not take her captures within the jurisdiction of a Prize Court. She carries no prize crew which she can put on board a prize. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew of the vessel she sinks. Her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war. The German declaration substitutes indiscriminate destruction for regulated capture.

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"Germany is adopting these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds (including food for the civil population) from reaching or leaving the British Isles or Northern France. Her opponents are, therefore, driven to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany. These measures will, however, be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity.

"The British and French Governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation.

"The treatment of vessels and cargoes which have sailed before this date will not be affected."

Then followed in due course the first Order in Council as a retaliatory order. It recited that the German Government had issued certain orders which, in violation of the usages of war, purported to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels would be destroyed irrespective of the safety of the lives of passengers and crews, and in which neutral shipping would be exposed to similar danger in view of the uncertainties of naval warfare, and had warned neutrals against entrusting crews, passengers, or goods to British or allied ships. It contained further recitals to the effect that the enemy's conduct gave to this country an unquestionable right to retaliation; that His Majesty had therefore decided to adopt measures in order to prevent commodities of any kind from reaching or leaving Germany; but that such measures would be enforced without risk to neutral ships, or to neutral non-combatant life, and in strict observance of the dictates of humanity; and that the object of such measures was to restrict the commerce of Germany.

The operative part of this Order was directed to four classes of cases, in which it was intended to place difficulties, or to impose restrictions on trade by or with Germany, through the carriage by sea of goods from or to that country, namely: (1.) To goods laden

on vessels voyaging to a German port; (2.) To goods laden in a German port on vessels voyaging from a German port; (3.) To goods carried on a vessel on her way to some port other than a German port when the goods had an enemy destination or were enemy property; and (4.) To goods on board a vessel sailing from a port other than a German port, which were of enemy origin, or were enemy property.

In these various cases it was provided that the vessels might be required to discharge the goods to which the Order applied in a British or allied port. But the vessels themselves were not made subject to the penalty of condemnation or even detention. The goods required to be discharged were to be placed in the custody of the marshal of this Court, and unless contraband of war, or requisitioned, they (or their proceeds if sold) were to be dealt with by restoration or detention until the conclusion of peace, or otherwise in such manner as this Court might in the circumstances deem to be just. A very large number of cases have been dealt with in this Court under the Order, and in the French Prize Court under a similar Order.

Part of the argument of the present claimants involves the question of the validity or legality of this first Order. But it was not pressed in these proceedings because in a case which came before me in August, 1915, and April, 1916, namely, *The Stigstad* (1), it was decided that this Order was valid. The question of its validity was then raised, although it was not much argued. But the appellate tribunal in that, or in the present case, may be asked to review and reverse the decision then pronounced. In the meantime, especially as the Order in Council has similarly been acted upon in scores or hundreds of cases since, I do not retract from the judgment, although I hope my mind will not on that account swerve in forming a decision upon the question now raised as to the subsequent Order of February, 1917.

To revert to the history of the enemy's conduct at sea after the Declaration of February, 1915, the German authorities lost no time in carrying into effect their threats. Their submarines sank British ships and destroyed lives of innocent persons in March. In April they sank Dutch, Swedish, and Portuguese ships (Portugal at that

(1) [1916] P. 123.

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time being neutral). They also torpedoed a Belgian Relief ship without warning and sank her in five minutes, causing the loss of seventeen lives, although it was in the daytime and the vessel was flying the Belgian Relief Commission's flag, and displaying the Commission screens on both sides, marked "Commission Belgian Relief, Rotterdam" in letters over two feet high, and had actually been granted a safe conduct by the German consul at the Hague.

And it will be remembered—can it ever be forgotten?—that on May 7 the *Lusitania* was torpedoed and sunk when she was carrying nearly 2000 persons of all classes and ages, and that in the frightful disaster 1198 men, women, and children were drowned. No more callous or cruel crime has been committed since the day of Cain. The first murderer seemed, however, to have felt some shame and remorse, as he denied the crime at the outset, and afterwards moaned that his iniquity was more than could be forgiven. But the authors and instigators of the inhuman, fiendish atrocity of the *Lusitania* were such beings as could rejoice and revel in it. Lest the civilized world which stood aghast at the crime might misunderstand or forget it, they struck a medal of a vile kind to celebrate and commemorate it, replicas of which were sent to neutral countries in proud proof of their prowess.

This being the attitude of the enemy, it is not to be wondered at, therefore, that through 1915 and 1916 the outrages continued. Nay, further, in the beginning of 1917 the severity of the submarine atrocities was to be increased, and a formal announcement of an almost unlimited submarine warfare in European waters was made by a memorandum of the German Government, which was expressly directed against "all sea traffic." In order to appreciate its extent, and the interference of its operations with neutral shipping and sea commerce and its disregard of innocent human life, it should be read in its entirety:—

MEMORANDUM OF PROJECTED GERMAN WAR MEASURES AT SEA PUBLISHED IN THE *Deutsche Reichsanzeiger* of February 1, 1917.

"From February 1, 1917, all sea traffic in the hereafter designated barred zones around Great Britain, France and Italy, and in the Eastern Mediterranean, will without further notice be opposed

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by all weapons. Such barred zones are :—(A) In the north an area around England and France, delimited by a line at 20 marine miles distance along the Netherland coast to Terschelling Lightship, the degree of longitude from Terschelling Lightship to Udsire, thence in a line through the point 62 degrees north latitude, 0 degrees longitude, to 62 degrees north, 5 degrees west; further to a point 3 marine miles south of the southern extremity of the Faroes; thence through point 62 degrees north, 10 degrees west to 61 degrees north, 15 degrees west; then 57 degrees north, 20 degrees west to 47 degrees north, 20 degrees west; further to 43 degrees north, 15 degrees west; then along latitude 43 degrees north to 20 marine miles from Cape Finisterre, and along the northern coast of Spain at 20 marine miles distance to the French frontier.

"(B) In the south of the Mediterranean Sea. To neutral shipping the sea area remains open west of a line drawn from Point de l'Espiquette to 38 degrees 20 minutes north and 6 degrees east as well as north and west to a strip 60 marine miles wide along the North African coast beginning at 2 degrees west longitude.

"In order to connect this area with Greece a strip 20 marine miles wide runs north or east respectively of the following line :— 38 degrees north and 6 degrees east to 38 degrees north and 10 degrees east, to 37 degrees north and 11 degrees 30 minutes east, to 34 degrees north and 11 degrees 30 minutes east, to 34 degrees north and 22 degrees 30 minutes east. From here a strip 20 marine miles wide runs west of longitude 22 degrees 30 minutes east into Greek territorial waters.

"Neutral ships which navigate the barred zones will do so at their own risk. Even though provision be made that neutral ships which on February 1st are en route to ports in the barred zones will be spared during an appropriate period, it is nevertheless urgently advisable that they be warned by all means available and directed into other routes. Neutral ships which are lying in ports in the barred zones can with equal security still leave the barred zones if they depart before February 5 and take the shortest route to a free zone.

"The traffic of regular American *passenger* steamers can continue to proceed unmolested on the following conditions :—

"(*a*) If Falmouth is taken as the port of destination.

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"(*b*) If on the voyage out and back vessels are steered for the Scillies as well as to a point 50 degrees north and 20 degrees west. On this route no German mines will be laid.

"(*c*) If steamers bear the following special signs which in American harbours are permitted to them alone—namely the hull and superstructure to be painted with vertical stripes, three metres wide, alternately white and red; on each mast to be a large white and red flag chequered; at the stern the American national flag. During darkness the national flag and the painting must be as recognizable as possible from afar, and the vessels illuminated brightly throughout.

"(*d*) If one steamer goes weekly in each direction arriving at Falmouth on Sunday and departing on Wednesday.

"(*e*) If the guarantee of the American Government be given that these steamers carry no contraband (according to the German contraband list).

"Maps are attached in duplicate in which the barred zones are shown."

This called forth the second retaliatory Order in Council now under consideration. It recited (inter alia) that the enemies' proceedings rendered it necessary for His Majesty to adopt further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for that purpose to subject to capture and condemnation both the vessels carrying goods with an enemy destination or of enemy origin and the goods themselves unless the vessels afforded to the forces of this country and its allies ample opportunities of examining their cargoes. It then set forth its cardinal provision that such vessels and goods should be liable to capture and condemnation. It also contained a clause that the Order was supplemental to the said Order in Council of March 11, 1915, and an intermediate one of January 10, 1917, for restricting the commerce of the enemy. Some criticism was made upon other parts of the Order and its effect on the particular vessel captured, which will be noticed in the proper place after the legality of the Order in general has been considered.

Its validity was attacked by the claimants upon the general ground that it was against the law of nations, from various points.

It will be convenient to state the several contentions in condensed form, for the purpose of directing attention to them as branches of the arguments. Some were advanced and pressed by counsel for the cargo owners, others by counsel for the shipowners, in various degrees of urgency; but neither of the advocates actually disavowed any contention of his colleague. They may therefore be taken together.

I think they may be summarized fairly as follows:—

(*a*) That no measure of retaliation by a belligerent for acts of an enemy admittedly committed in breach of international law, or even of the dictates of justice and humanity, is justifiable by the law of nations if and in so far as it affects neutrals with any inconvenience or loss.

(*b*) That no measure for restriction of the enemy's commerce, whether taken by way of retaliation or otherwise, is justifiable by the law of nations, if thereby the trade of neutrals by sea is interfered with to a greater extent than it is by the existing rules relating to contraband, strict blockade, or unneutral service.

(*c*) That no such measure is justifiable by the law of nations, unless full compensation for all inconvenience or loss is provided for the neutrals affected as their absolute and unqualified right.

(*d*) That neutrals are entitled to carry on their seaborne trade with the enemy with impunity whatever breaches of international law he may be guilty of, at any rate if they make a formal protest against his illegal conduct, subject only to the risk involved in carrying contraband, or attempting to break a recognized legal blockade of the enemy's ports or territory.

(*e*) That even if some measure of retaliation is allowed by the law of nations which may affect neutral commerce, the Order in Council of February, 1917, is invalid because it imposes upon neutrals excessive interference, inconvenience and loss.

(*f*) That in this particular case as respects the *Leonora* and her cargo, the Order in Council is invalid (1.) because the coal was not of enemy origin; and (2.) because no port had been appointed to which the vessel could go for examination.

I shall deal with the last two heads separately later. As to the others, three main questions arise. First, does the Order in Council comply with, or does it offend against, the guiding principles of the

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law of nations? Secondly, are there any precedents or decisions in favour of or against its validity? And, thirdly, is there authority for or against it, apart from actual decision or ruling precedent?

War between powerful States must act and react not only upon the belligerents themselves, but also upon other States that take no actual part in it, and their subjects. When war is carried on by sea, neutrals are naturally more affected in relation to their trade than they are by land warfare. Belligerents who have had supremacy or superiority upon the waters have insisted progressively and effectively upon their right to bring pressure upon their enemies in proportion to their maritime power. In the development of the rules of international law touching this right, inevitable conflicts have arisen between belligerents and neutrals as to what kinds of acts belligerents were entitled to commit with the aim of defeating or afflicting their adversaries, however much neutral traders might suffer in the process; and as to what neutrals were entitled to do in the exercise of their commerce whatever the results to the belligerents might be.

In modern times the two chief points of controversy have related to the carriage of contraband and to trading through blockaded ports. It is not necessary to pursue the interesting history of the development of the rules of international law upon these subjects. I only wish to note and extract the principle upon which they are based. Broadly, the principle is that the maritime commerce of neutrals is subject to restriction by the acts of States at war, if that commerce tends to assist an enemy either directly in his warlike operations, or indirectly in the carrying on of his own trade upon which his power of continuing the war may largely, or even entirely, depend. The object, and the legitimate object, of a belligerent is to destroy or cripple the enemy's commerce. The result, and the inevitable result, to neutrals is interference with their trade.

In the application of the principle, the boundary of the law of nations has been extended from time to time to adapt itself to new and ever-changing conditions. This law must from its nature have room for expansion. It cannot and never could be squeezed into a mould of a particular size or shape. It never had or could have the quality of immutability attributed to the laws of the Medes and Persians. It could not be confined within artificial limits like

an Act of Parliament. It has the essence and qualities of a living organism like the common law of this realm.

In the two branches already mentioned, namely, contraband and blockade, this natural development is clearly illustrated. Contraband goods were at one time comprised within a very limited catalogue. At the present day, the list is extensively enlarged. The result to neutrals has been that their trade in such goods has had to run greater and increasing risks and penalties. Moreover, in recent times not only have the contraband goods themselves been subject to confiscation, but the neutral vessels which carry them have also been rendered confiscable in many cases. It has become established law, too, that other goods on the same vessels belonging to the same neutral owners suffer the same fate, although they have no contraband character or enemy destination. It may be added, also, that the application of the doctrine of continuous voyage to contraband trade has greatly encroached upon and fettered the trade of neutrals in time of war. This doctrine was originated in connection with the so-called "Rule of 1756," but since its extension to trade in contraband goods by the Courts of North American States at the time of the Civil War it has become established as part of the law of nations.

The law of blockade has the same fundamental principle as that of contraband, and carries it out to a still greater extent, because it involves the confiscability of the vessels and of goods of all descriptions, by whomsoever owned, laden on whatsoever vessels, and whether proceeding to or from blockaded ports, if the vessels are captured in running, or attempting to run, the blockade. The justification of these rules, so serious to neutrals, is the acknowledged right of belligerents to bring pressure on the enemy by curtailing or stopping all trade in all commodities whatsoever to or from ports of the enemy, apart altogether from any direct relation of the trade or goods to immediate war uses. In the region of blockade changes in the rules have also been established which have involved, of necessity, substantial increases in the degree to which neutral commerce has suffered.

For a long time it was deemed necessary to prove a strict blockade of particular ports by war vessels which were stationary or remained in sufficiently close proximity to the ports. But now what is known

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as commercial blockades are fully recognized. Upon this question the Convention called the Declaration of Paris was not very definite. The "*effectif*" character of a blockade, even with the added definition, was left in a somewhat general form, perhaps advisedly. It is well known that the United States of America never agreed or adhered to the Convention, although they have acted largely in accordance with its articles.

A word as to the history of the attitude of the United States upon the question of blockade may be forgiven as showing the rapid and even sudden extension of the law. In 1859 the President of the United States (President Buchanan), in addition to the first requirement that all private property, enemy or otherwise, should be immune from capture at sea, asked for the abolition of commercial blockades also as a condition before the United States would adhere to the Declaration of Paris. In June of that year the United States Secretary (Mr. Cass) in a circular to the Powers wrote as follows: "The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities. . . . . But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly Powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times" (Westlake, 2nd ed., part 2, p. 262, and Moore's Digest of International Law, vol. 7, p. 781). Yet only a couple of years had passed when President Lincoln declared a commercial blockade of the Confederate ports which extended over a coast line of 3000 miles, which Mr. Dana in his notes to Wheaton described as "one of the most extraordinary in history." At the outset the Federal fleet was not equal to such a gigantic task, for it consisted only of forty-five vessels of war. Merchant ships constantly succeeded in entering and leaving the ports on the blockaded coast. Even in 1863 and 1864 this was so. From January, 1863, to April, 1864, of 590 vessels which attempted to run the blockade of the port of Charlestown, 480 succeeded (see Geffcken sur Heffter, 4th ed., 1883, s. 154 and note). But the United States insisted on, and the foreign

Governments recognized, the blockade. And as the war progressed the development of the naval resources of the Northern States enabled them to intercept much of the trade with the South; and this contributed largely to their ultimate success.

It is of course true that according to the existing rules of international law there can be no blockade of neutral ports or coast lines. The Order in Council does not purport to declare a blockade of the ports to which it applies in the strict sense in which that term is used in international law. But the object at which it aimed as regards the enemy is similar. In saying this, I am not suggesting that the method adopted by the Order in Council has been accepted by the nations in such a way that it already forms part of established law. That some change will evolve upon this subject in view of the kinds of weapons now used on and under the sea and in the air seems certain. Meantime, can it be said that what the Order in Council prescribes is in any essential principle different from a blockade? Is it not on the lines of a blockade, by whatever name it may be called? It is not a blockade of enemy ports. But it is a stoppage or quasi-blockade of the enemy's maritime trade through adjacent ports. It was strenuously argued, however, that the existing limits of the doctrines of blockade and contraband should not in any circumstances be extended or transgressed, even if some measures of retaliation on the enemy were allowed.

A man of acknowledged ability as an admiralty constitutional lawyer and publicist, who was probably and almost certainly the real author of the British Orders in Council of 1807, wrote caustically in 1805 as follows: "To those idolaters of the neutral flag who hold a yard of bunting on the poop of a merchantman more sacred than the veil of a vestal, I have nothing to offer. If this inviolable emblem ought absolutely to arrest the arms of contending nations, and preserve in all cases the contents of its sanctuary from capture, it may with equal reason, I admit, receive under its safeguard the colonial commerce as the general property of a belligerent. But there are some champions of neutral pretensions who without openly contending for these extravagant doctrines maintain stoutly that neutral merchants have a right to trade on their own account with the Powers at war, wherever, and in whatsoever commodities, they please. If contraband goods, and

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blockaded places be graciously excepted, this is the utmost extent of their abstinence. All other neutral commerce they hold to be unquestionably legal." (See "War in Disguise," 3rd ed., 1805.) The anonymous author was Mr. James Stephen; and in his place in Parliament some years later he tacitly admits what has been said as to his connection with the Orders in Council: See Parliamentary Debates for 1812: Hansard, 1st Series, vol. 21, col. 1136.) The last few sentences describe generally the contentions (or "pretensions") of the present claimants.

Before leaving this part of the case I must make some observations upon the suggested hardships which neutrals would have to bear if the Order in Council was allowed to operate. Neutrals are apt to assert their so-called "rights" in times of war, and to forget any corresponding "obligations." They proclaim vociferously their losses, but they do not speak loudly of their gains. Over and over again evidence has been given before me in this Court of large, nay huge, profits made by merchants in Holland and Scandinavia by reason of the war. Incomes have been doubled, trebled, quadrupled, even decupled, through the trade with Germany which has been carried on through neutral ports having convenient access to the enemy territory. It was always thus. Commercial human nature is not averse from taking pecuniary advantage whenever it is possible; and does not concern itself overmuch with the difficulties or distress which create the opportunity for profit.

I am tempted to make another quotation from the work just referred to which appears to be apt: "If neutrals were really losers by the wars of their neighbours, it would, perhaps, be fortunate for mankind; but would give them no right to indemnify themselves, by accepting, in the form of commerce, a bribe from the weaker party, to protect him from the arms of the stronger. But in the last and present war, at least, this pretence has no shadow of foundation. Let the neutral powers confess that their late vast apparent increase in commerce is fictitious, and that the frauds also are gratuitous; or let them admit that independently of the trade in question, they have enormously profited by wars, which to their friends have been highly disastrous. . . . . The neutral has many fair indemnities, without any trespass on belligerent rights. The comparative

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cheapness of his navigation gives him in every open market a decisive advantage. In the commerce of other neutral countries he cannot fail to supplant the belligerents; and the latter will naturally give him the carriage of such of his own commodities, as he before usually supplied them with, partly or wholly through their own navigation. . . . . He obtains also a still larger increase of commerce, by purchasing from the one belligerent, and selling to his enemy, the merchandise for which, in time of peace, they mutually depended on each other. The decay of his old branches of trade, therefore, if any such decay arises from the war, is on the whole amply compensated."

After the first British Order in Council (January, 1807) issued in retaliation for Napoleon's Berlin Decree, Denmark made similar complaints to those now put forward for Holland and Sweden through the mouths of the claimants. In the dispatch sent to the Danish Minister on March 17, 1807, Lord Howick (afterwards Lord Grey), the British Foreign Secretary, made answer, in part, as follows:—

"It is principally from the success of the British maritime force, which has almost annihilated the navigation of the enemy, that the ships of Denmark and other neutral States are employed as carriers from hostile port to hostile port, in order to relieve the enemy from his distress; and it is notorious that the trade thus carried on is supported by the shameful misconduct of neutral merchants, who lend their names for a small percentage, not only to cover the goods, but in numberless instances to mask the ships of the enemy.

"The Danish Minister in his note, seems, indeed, so intent upon asserting neutral rights, as apparently to forget that there also exist corresponding neutral duties.

"Neutrality properly considered does not consist in taking advantage of every situation between belligerent States, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage in the war to either; and particularly in so far restraining its trade to the accustomed course which it held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities. The duty of a neutral is—non interponere se bello, non hoste imminente hostem eripere; and yet it is manifest that lending a

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neutral navigation to carry on the coasting trade of the enemy is in direct contradiction of this definition of neutral obligations, as it is, in effect, to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British Navy, to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace" (Hansard, Parliamentary Debates, 1st Series, vol. 10, col. 405).

The particular references here made are of course to the "Rule of 1756" and the decisions which extended it; but the general observations both as to doctrines and facts are closely applicable to the circumstances of the present war.

I now leave the first of the three main questions, with the expression of my view that if it is permissible in the circumstances of the present war, and in view of the enemy's conduct, to allow by way of retaliation any extension of the powers of a belligerent at sea for the restriction of the commerce of the enemy, it does not appear to me that the Order in Council proceeds upon any principle inconsistent with or essentially contrary to those already embodied in the law of nations.

The second and third general questions, which can be taken together, were: Are there any precedents or decisions, or any authority apart from actual decision or precedent, in support of or against the validity of this Order?

There is no decision against it. It was contended that no authority in support of it could be adduced from any of the early writers on international law. In my opinion, no help is given on the subject by Grotius, Bynkershoek, Pufendorf, Vattel, or any of the great jurists of early days. I accordingly refrain from references to them. (It may be well in passing to notice that when these and other writers refer to "reprisals," or "retorsion," they usually have in view acts done before the outbreak of war. To avoid confusion, I prefer to use the term "retaliation" in reference to the provisions of the present Order in Council.)

I leave also aside the various decrees issued by States at war, particularly in the sixteenth and seventeenth centuries, directed to prevent any trade between their enemies and any neutrals, and the treaties made between States from time to time with the same object, because they do not appear to assist in the determination of the questions now in dispute.

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The precedents relied upon in favour of the present Order are the Orders in Council of January 7 and November 11, 1807, and April 26, 1809, promulgated during the Napoleonic war in answer to Napoleon's celebrated Berlin and Milan Decrees of November 21, 1806, and December 17, 1807; reliance is also placed on some decisions relating to those Orders.

The conditions prevailing at sea in those years as between this country and France, and the other territories controlled by or under the influence of Napoleon, were peculiarly like those which now exist between this country and its enemies, with the exception, —the serious exception—of the submarine weapons used in this war by the Central Powers. The trading vessels of France had been swept off the open seas, as the trading vessels of Germany and the enemy countries have been during the present war. In 1805 it was stated, and truly stated, that, with the exception of a few coasters, "not a single merchant ship under a flag inimical to Great Britain now crosses the Equator, or traverses the Atlantic Ocean." In the Code des Prises, tome 11, p. 385, this passage occurred: "Et quand il est malheureusement trop vrai, qu'il n'y a pas un seul vaisseau marchand, naviguant sous pavillon Français, quel autre moyen d'exportation avons-nous, que l'emploi des vaisseaux neutres?" Similarly in 1917 it might be truly said that not a single merchant ship under a German or other enemy flag sailed on any open sea.

It is important to bear in mind the state of things in 1806 and 1807 when the Orders in Council of the latter year were issued, by reason of the criticisms then made (more particularly with reference to America) that they could not really be considered "retaliatory" because Napoleon's Decrees could not be carried into effect, and were no more than *bruta fulmina*, and there was nothing for which to retaliate.

The whole of Napoleon's celebrated "Continental System" was aimed at the complete annihilation of British commerce, and he used whatever means he could command to achieve that aim. The first Decree was issued by him from Berlin in the temper of the conqueror who just a month before had placed his heel on the neck of Prussia at the battle of Jena. It contained recitals egregiously unfounded and false, and proceeded to decree that the whole British

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Isles were in a state of blockade; that all trade and correspondence with them were prohibited; that every magazine, every kind of merchandise, every species of property, *which belonged to an English subject* should be considered as lawful prize; that no ship from England or her Colonies, or which should have touched there, should be admitted into any harbour; and various other matters. Three days afterwards (November 24, 1806), in order to begin giving effect to it, the Decree was recapitulated in a proclamation from the French Minister to the Senate of Hamburg, which stated "that as several of the citizens of Hamburg were notoriously engaged in trade with England, the Emperor of the French was obliged to take possession of the city in order to execute his decree," and this threat was executed on the same day by Marshal Mortier and a division of the French army. (1)

The first British Order in Council (January, 1807) prohibited the trade of neutrals from one port to another, both of which should belong to or be in the possession of France or her allies, or should be so far under their control that British vessels might not fully trade with them; and ordered any vessel found so trading, after warning or knowledge, to be captured and brought in and together with her cargo, to be condemned as prize. It is important to observe the foundation and extent of the Order as set out in the preambles. They state that the attempts of the enemy to prohibit the commerce of all neutrals with the British dominions would give "an unquestionable right of retaliation, and would warrant this country in enforcing the same prohibition of all commerce with France; and that His Majesty, though unwilling to follow the example of the enemy by proceeding to an extremity so distressing to all nations not engaged in the war, yet felt bound by a due regard to the just defence of the rights and interests of his people, not to suffer such measures to be taken by the enemy, without taking some steps to restrain that violence, and to retort upon the enemy the evils of his own injustice."

The next Order of November 11, 1807, recited that the previous

(1) [Notwithstanding this occupation the effect of the Orders in Council cited in the judgment was to treat Hamburg as neutral for commercial purposes: *Hagedorn* v. *Bell* (1813) 1 M. & S. 450.—F. P.]

Order had not answered the desired purpose, either of compelling the enemy to recall his Orders, or of inducing neutral nations to interpose with effect to obtain their revocation, but that on the contrary they had been enforced with increased rigour, and that further measures were necessary. It then contained various provisions which need not be here specifically referred to, the main one being an Order that "all the ports and places of France, and her allies or of any other country at war with His Majesty, and all other ports and places in Europe from which although not at war the British flag is excluded, and all ports or places in the Colonies belonging to His Majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions hereinafter mentioned, as if the same were actually blockaded by His Majesty's naval forces, in the most strict and rigorous manner."

Then followed the Milan Decree of December, 1807, which was still more violent than its precursor from Berlin. I do not refer to its provisions, nor to some other minor Orders issued from this country, as they afford no assistance. But there was the later British Order in Council of April 26, 1809, which should be referred to, as it revoked the one of November, 1807, and contained certain mitigations in favour of neutrals and chiefly intended for the United States of America. This 1809 Order and the one of January, 1807, were those in force at the dates of the decisions of Sir William Scott in *The Fox* (1) and *The Snipe*. (2)

Before I examine these two decisions I propose to observe upon other matters prior in date, which have a bearing upon the question of the legality of the Orders in Council, and also throw significant light upon these two judgments, and upon some earlier cases decided by the Lords Commissioners of Appeals in Prize Cases.

The validity in law and the public policy of the Orders in Council were much debated in Parliament and discussed by commercial authorities. With the policy and its results and the system of licences which afterwards came into vogue a Court of Prize has no concern.

In order to appreciate matters strictly relative to the discussion of the legality of the Orders, it is essential to keep in mind that the

(1) Edw. 311. (2) Edw. 381.

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opponents of the Orders were in the main champions of the cause of neutral America ; that it was constantly asserted that an undertaking had been given to the Government of the United States by a M. Decrès, the French Minister of Marine, to the effect that the Orders were not intended to be used against the United States and would not be enforced against them, and for this reason it was urged against the Orders that no retaliation which would affect the United States was in these events justifiable ; and (as I have before indicated) it was further urged that the French fleet had no power whatever to carry out the threats of Napoleon, and had not attempted to do so, and that, accordingly, there was nothing more than an empty menace for which no retaliation was necessary or justifiable.

There is no legal impropriety, I think, in referring to views of statesmen and lawyers (outside the Courts) upon questions touching the law of nations, particularly in the special instances which I shall give. I shall first call attention to the opinion expressed by Sir William Grant in the House of Commons in the course of a debate upon the Orders in Council. He was then Master of the Rolls. His character and learning were in the highest repute. Lord Brougham wrote of him that he was " in some respects the most extraordinary individual of his time—one certainly than whom none ever better sustained the judicial office," and that when he was raised to the Bench " the genius of the man then shone forth with extraordinary lustre " ; he also described him as " the model of a perfect judge." Another eminent person, Lord Campbell, said of him : " Luckily for the public, the office of Master of the Rolls was at this time " (that was when Lord Erskine was Lord Chancellor) " held by Sir William Grant, who came up to the highest notion that can be formed of judicial excellence." No praise could be higher ; and it came from two witnesses who were not too indulgent or over-generous in their estimates of men. It is also, assuredly, a fact of special significance that Sir William Grant was, at the time he pledged his great reputation in the opinions I am going to cite, the judge who presided over the Lords Commissioners as the Court of Appeal in Prize Cases from the decisions of the High Court of Admiralty in Prize, before which questions of law under the Orders in Council might and did in fact arise.

In the debate (February 5, 1808) Sir William Grant followed

Dr. Laurence—himself a lawyer of eminence in the Admiralty and Prize Courts—and, according to the Parliamentary Debates of the time (1), spoke to the following effect :—

" His honourable and learned friend " (i.e., Dr. Laurence) " had admitted that on a principle of retaliation, measures of this kind were justifiable, and he agreed with his honourable and learned friend, that when such measures were to operate upon innocent neutrals, it ought to be grave matter of consideration whether they should be resorted to. His honourable and learned friend had stated that such measures ought to follow the acts of the enemy, or otherwise they would not be acts of retaliation. With this doctrine he agreed in part; but when the enemy departed from justice, he was of opinion that we were justified in retaliating in substance, and not bound to adhere to the form. . . . . The Orders in Council did not and could not alter the law of nations. The King might issue his declaration, because he was not to leave his Courts to infer what was the law of nations, but the King's declaration did not alter the law of nations, but was to be justified by that law. . . . . Persons entertained strange notions of the law of nations, when they supposed that a nation could not perform an act of rigour for its own preservation, without violating the rule of its conduct. But this could not be a violation of the rule, for the case was out of the rule. When the enemy abandoned the rule, it was our duty not to be bound by it, but to inflict that injury upon him which he intended for us, until we forced him to peace. If France could continue to enjoy all the advantages of commerce through neutral trade, whilst we were suffering every injury that could result from her decrees, she would have no motive to peace and this country would soon be reduced to the alternative, either of submitting to peace upon any terms, or of continuing the war to an endless period. He thought that Europe might be made to feel that a maritime power was much less dependent upon Europe than the Continent was upon the maritime power. He would not suffer his country to perish, merely because the measures which were necessary for its preservation might press upon neutral commerce which

(1) All the passages quoted from the Parliamentary Debates will be found in Hansard, 1st Series, vol. 10, and the reference in this and the succeeding passages are to the column in that volume.

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Napoleon had before violated. There was no contract without a reciprocal obligation, and if neutrals did not oblige the other party to adhere to the law of nations, they could not complain of us for not adhering to it. . . . . The late Orders were only in conformity with that law upon the principles of retaliation" (332 et seq.).

Sir William Grant may therefore be fairly cited as one who lent his great authority to the support of the Orders in Council on the ground that the law of nations permitted them as measures of retaliation.

Ten days later Sir John Nicholl took part in the debate on the second reading of the Orders in Council Bill. He was at that time the King's Advocate-General. He spoke as one in a position of responsibility; and in prefacing his speech he said that the House would naturally expect that he should lay before it his views and the grounds for his opinion, and that in doing so it was necessary for him to look to the policy and to the legality of the measure. I would mention of Sir John Nicholl that in 1809 and 1810 he also formed one of the Court of the Lords Commissioners of Appeals in Prize, and sat in cases where the legality of these very Orders in Council appear to have been raised. His speech was comprehensive and had obviously been carefully considered. Material parts of it are reported as follows:—

"It is evident that the Decree of the French Government of November 21, 1806, is the foundation of the present proceedings. . . . . The effect of that Decree was to exclude us from all foreign powers whatever; and to prevent them not only from carrying on their accustomed trade with this country, but even to exclude the possibility of one neutral nation trading with safety to another. . . . . That Decree of the French Government avowed itself to mean a retaliation for an imaginary offence; and what then became the duty of this country, and other countries, in consequence of this outrageous measure? It surely became their duty to render such a mode of unaccustomed warfare to be retaliated and retorted upon the enemy. It was our duty to do this with as much forbearance as possible against other countries. Although it was a just principle in the law of nations that other countries must naturally suffer, in a certain degree, by the methods adopted by

belligerent powers ; yet it is the duty of each to render that suffering as little injurious as possible. . . . . (667). Be it recollected that our commerce constituted the sinews of war, and therefore those measures of retaliation which we adopted were absolutely necessary for our preservation and defence. . . . . (673) Upon the ground of retaliation we are perfectly justified, . . . and founded upon the law of nations. In 1798, Russia feeling at that period the aggressions and overweening tyranny of France, did issue an Order of a much stronger stamp than those issued by Great Britain ; that Order authorised the seizure of all ships proceeding to France.

"I do contend that the question of the conformity of these Orders to the law of nations cannot be viewed in the abstract. It may be asked, will you repel injustice with injustice ? No. But I would ask, is it to be endured that one belligerent shall be suffered to act towards another in a manner the most unjust, and the most contrary to the laws of nations, and that the other belligerent shall be bound to observe the accustomed usages and conduct towards her ?

"I do contend that France has acted towards this country in open violation of every law of nations ; and I do maintain that this country is justified in retaliating upon her. If it be said that the law of nations ought not to be observed, I do from my heart protest against such a principle. I do think that nothing but the most urgent necessity can warrant its non-observance. If, however, your enemy will not be bound by it, I do think that you have no other resort but that of going back to first principles, and looking to self-preservation. Much has been said of the infringement of neutral rights ; but I have heard very little said of neutral duties. In the operation of these Orders in Council, it never was in the contemplation of the framers of them to oppose neutral rights. If America suffer, it is what is unavoidable where her interest is so connected as in the present war between this country and France. These measures against America were alone intended to annoy France, not to injure or infringe upon the rights of neutrals" (674).

That is all that need be quoted as to the legality of the Orders in Council. But I may be pardoned for adding the following passage for reasons which will be obvious. It was delivered over a century ago ; but it strikes also a familiar modern note : "The period in

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which we live is awful beyond example, and the contest in which we are engaged, great beyond precedent. We are possessed of the dominion of the seas; France of the land; so far we are on a footing of complete equality. I regret to hear that so much clamour has been raised, by I know not what infatuation, for peace at the present moment. Are those who are such advocates for that measure, satisfied that it would be a lasting, solid, and safe one? I very much fear that no peace of the kind could be obtained at present. I am satisfied that by carrying on the contest with that spirit and energy that become a free people, the issue will be speedy, honourable, and glorious" (675).

Shortly afterwards (March 10, 1808) another eminent authority spoke on the third reading of the same Bill, namely, Sir William Scott. He was then and had for many years been the Judge of the High Court of Admiralty and Prize, and had already established a great body of prize law in this country, which has remained as a solid foundation ever since, not only in these islands, but in other countries also, particularly in the United States of America.

The Parliamentary Debates report that "Sir William Scott entered into a learned discussion upon the law of nations, which being in its nature conventional, was no longer binding than when the rules of this convention were adverted to by all parties concerned. When they were departed from by one party, the other was left to the guidance of natural justice; and by the laws of natural justice, retaliation was authorized as an essential part of self-defence. The right of retaliation the learned judge showed to be limited only by the extent of the annoyance which called forth the exercise of it. If an enemy restricted himself to the ordinary mode of warfare, then it was incumbent upon the other belligerent to carry on hostility under the same restrictions, but if he resorted to unusual modes of warfare then it was competent for his adversary to pursue him, even to neutral ground. The right was unquestionable; the only question was the prudence of exercising it" (1066).

The speech cannot be well or adequately reported, and the argument as contained in the report is not as logical or as cogent as that of Sir William Grant; but the fact remains that in the Senate as well as in the Forum Sir William Scott justified the Orders.

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Finally, I propose to draw attention to a learned discourse upon the subject of the law of nations and of the Orders in Council made by the great Lord Erskine. I do so more particularly because he strongly opposed the policy of the Orders in Council, chiefly in reference to their tendency on the United States of America, and because the ground upon which he denied their legality as retaliatory measures in the particular circumstances of the time, was, to put it shortly, that the Berlin and Milan Decrees had not been executed against or acquiesced in by America. Any opinions of this eminent man, therefore, justifying retaliation in other cases are not reduced in importance, but rather are enhanced in value by reason of his general attitude of opposition on these special grounds. The speech was delivered in the House of Lords on March 8, 1808. It was of a most eloquent and elaborate character. I must try to restrict quotations from it as much as possible, consistently with showing the bearing of Lord Erskine's views upon the questions raised in the present proceeding. He moved a series of resolutions, of which the third was as follows: "That the law of nations is a part of the law of the land, and that neutral nations not interposing in the war between His Majesty and his enemies, have a legal right to such freedom of commerce and navigation, as is secured to them by the law of nations" (934). This, as he said, he might assume without argument, apart from the exceptional circumstances. Indeed, it sounds axiomatic. But the phrase "such freedom of commerce and navigation as is secured by the law of nations" seems to beg the question. After some discussion of the general proposition, however, he proceeded thus (936):—

"I am ready, however, to admit that this is only the ordinary condition of neutrals whilst belligerents observe the law of nations towards one another. I admit that a different state of things may arise, concerning which, however, the public law is not silent, but observes the same principles of reason and justice. It is better at once to state the very case which produces the whole controversy, rather than imagine others, the application of which may be disputed. France issued her Decree of November 21, 1806, which (taking it, for the present, in its severest interpretation, untouched by any subsequent constructions) announced a resolution to distress this country in a manner unauthorized by public law; subjecting

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to capture the ships and cargoes of neutrals carrying British commodities and manufactures, or going to, or coming from Great Britain, with their accustomed trade. Such a Decree undoubtedly announced a rule which the law of nations forbids as being, even as between belligerents, (independently of the rights of neutrals) an aggravation of the sufferings of war which humanity and wise policy equally forbids, and which is, therefore, unauthorized by the practice of civilized States; such a Decree (if carried into execution) would invest the belligerent with a right of retaliation; and, indeed, as between the belligerents only, I am not at all anxious to dispute whether the very publication of such an unjust ordinance would not authorize the belligerent, so offended, to disregard the law of nations towards the adversary as far as it touched him only; but it would be an utter perversion of the very term retaliation, to carry it a hair's breadth further, until some act was done under the Decree, as against a neutral, by which the wrong done to, and suffered by, the neutral, became injurious in its effect to the offended belligerent. It is, indeed, quite astonishing to hear the word 'retaliation' twisted and perverted in a manner equally repugnant to grammar and common sense. Retaliation, in the strict, and literal, interpretation of the word, from *re* and *talio*, as you have it in all your dictionaries, signifies to return *like for like*. Therefore, but for the particularity of the case, the term retaliation could apply only to the return of like for like upon the enemy who committed the injurious act; by like for like, I do not mean that the act of retaliation, as against the enemy, must be the same as the enemy's, which would be quibbling with the subject; because as against him who injures me, I may return whatever is necessary to repel the injury suffered, and to secure me against its consequences. It was never, therefore, contended, as was lately supposed by a noble Lord, that if an enemy violated a neutral territory in the prosecution of his hostility, the other belligerent could only follow him as if he were hunting him upon the scent; certainly not. There the neutral, from wrong or from weakness, is made the direct instrument of attack, and he is bound to give me not merely the same path through his territory, thus violated, but any path which will best enable me to avert the danger arising from the former violation.

"If the Decree interdicting neutrals from trading with us, or

visiting our ports, is executed upon a neutral, it is an interdiction which he has no right to submit to, because the moment it is executed we are injured by the interruption of his commerce with us. If he submits from favour to the unjust belligerent, he directly interposes in the war, and the neutral character is at an end; retaliation then would not only be strictly applicable, but just and legal; and if he submits from weakness, or from any other cause not hostile or fraudulent, we have an unquestionable right, without any invasion of neutrality, to insist, that what he suffers from the enemy he shall consent to suffer from us, otherwise he would keep an open trade with the enemy at our expense, relieving him from the pressure of the war, and becoming an instrument of its illegal pressure upon us. In that case also the term retaliation, though not applicable perhaps in literal strictness, as it applies to the neutral, is substantially and justly applicable to him; because it is in fact retaliation upon the enemy, through the sides of the neutral, . . . in doing or suffering, by either of which our commerce is alike interrupted. But I cannot, my Lords, conceive anything more preposterous and senseless, than the idea of retaliation upon a neutral on whom the Decree has never been executed, because it is only by its execution on him, that we can be injured; what possible right then can we have to complain of, or to take any step against a neutral, who in no shape whatever, has been made an instrument of injustice by the enemy? What right can we possibly have to interdict his legal trade with the enemy, when, notwithstanding the Decree complained of, we have continued in the undisturbed enjoyment of the whole trade of the neutral, just the same as if the Decree had never existed? How can we possibly retaliate upon a neutral who has done nothing, although it is only by his doing or suffering that we can, by any possibility, be sufferers? But it has been said here formerly, Were we to wait three months, till we could learn from America, her dispositions and intentions? were we to wait three months more if they were doubtful? and, perhaps, three months afterwards till they were ascertained and acted upon? Certainly not, my Lords; no, nor an hour after France had acted upon the Decree by condemnation in her Prize Courts, if America, cognizant of such condemnations, had submitted to the decisions, and, with the consent of her Government, continued her commerce

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with France, as with a friendly nation. I should have considered that as full evidence of acquiescence; but, my Lords, the term acquiescence, as applied to America, like that of retaliation, appears to me to be wholly unintelligible, until some act was done by France, under her Decree, above all after the answer given to Gen. Armstrong's demand of explanation; for how can America be said to have acquiesced in the interruption of her commerce, if in no instance her commerce had been interrupted?" (939).

Then he referred to M. Decrès' alleged undertaking to Gen. Armstrong (to which I have already alluded) and added: "But, I am willing, my Lords, for the present to leave M. Decrès' explanation wholly out of the question, and to stand altogether wholly upon the non-execution of the Decree in order to examine the foundation of those dreadful consequences, which, it seems, must instantly have fallen upon us, if we had waited for its execution, and the acquiescence of America."

After dealing fully with the facts, Lord Erskine closed this part of his argument thus: "My Lords, I have therefore, I think, established that the Order of November 11, 1807, standing upon the execution of the Decree, and the acquiescence of America, is wholly unjustified by either; she never, indeed, denied the principle of retaliation, if it were executed and acquiesced in; so far from it that Mr. Madison in his very first letter to your Minister at Washington says: 'the respect which the United States owe to their neutral rights will always be sufficient pledges that no culpable acquiescence on her part will render them accessory to the proceedings of one belligerent nation, through the rights of neutrals, against the commerce of its adversary.' . . . . My Lords, it being thus matter of demonstration from facts uncontradicted, and incapable of contradiction, that the French Decree was not executed on America, and that she never acquiesced, as it regarded her, even under its principle or publication, we are brought back again to the law of nations; we must be bound by its ordinary principles, and governed by their universal application. The circumstances upon which the new conjuncture has been assumed having been removed, there can be no other standard by which the justice of our conduct to other nations can be measured" (948). (The reference made above was to a dispatch from Mr. James Madison, afterwards

President Madison, the American Secretary of State, to the British Representative in Washington, dated March 20, 1807.)

After dealing with the law of nations in ordinary circumstances Lord Erskine approached the question of the duty of the Court with regard to Orders in Council, upon which his statement was as follows: "My Lords, it may now be asked, whether I mean to contend upon all these authorities, that the Judge of the Admiralty ought not carry the Orders in Council into execution. It may probably be said, that my argument goes to that full extent; since if it be not competent for His Majesty to dictate to his Prize Courts a rule repugnant to the law of nations, the rule given by the Orders ought, according to my doctrine, to be resisted by these Courts. My answer, my Lords, to this seeming dilemma is by far the most important part of the whole subject, and it was for that reason I insisted, at such length, upon the injustice of introducing facts, into the preamble of the Order, which had no existence; because I maintain, that without such preamble the Judge of the Admiralty could not, consistently with all the authorities, and most especially with his own, have given effect to the exceptionable parts. But with the preamble, the truth of which he is bound by, I have not contended that the Order is not a law to his Court. I admit, my Lords, in the fullest extent, that it is the King's office and duty in the State to communicate with the Courts of the Admiralty and Prizes, and to issue orders, from time to time, for their government. The King alone can promulgate who are enemies and who are not; or what nation he chooses to consider his enemies, even before any declaration of hostilities. Without such acts of State the Courts of Admiralty and Prizes could do nothing. I admit that it would be for the King, in the very case before us, to promulgate to the Court of Admiralty the hostile Decree of France; and if the fact were so, to promulgate also that it had been executed upon America, and her non-resistance to its execution. I admit also, that if His Majesty, from unjust or mistaken counsels, is advised to promulgate such execution and non-resistance, that state of things is not traversable in the Court of Admiralty, but must be implicitly received as the fact, and, finally, I admit that the rule given by the King, upon the facts which he promulgates, must be received and acted upon by the Court, unless in the judgment and conscience of

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the judge, it be plainly and manifestly repugnant to the law of nations. But I do maintain and positively assert, that, in the very case before us, the Order of November 11, without its preamble, would have been manifestly repugnant to the law of nations, and that the judges of the Courts of Admiralty, and the Courts of Prizes, ought to have refused to act upon it" (957).

Most of the rest of the long oration deals with the provisions of the municipal law and other matters not now relevant.

After the Lord Chancellor (Lord Eldon) had replied justifying the Orders on the ground of retaliation, and pointing out that the Orders were directed against the enemy and not neutrals, and that the latter only suffered indirectly, although inevitably, in their commerce, Lord Erskine in reply took the same line of argument as he had presented in moving the resolutions and repeated: "We had no right to retaliate through the medium of a neutral, except that State was too weak to resist, or showed a disposition to acquiesce."

It is surely significant that, notwithstanding the public discussions and controversies of 1807 and the following years, no decision of the British Court of Prizes could be cited against the validity of the Orders in Council. Several cases were decided in the British Prize Court and in the Colonial Prize Courts in 1809 and 1810, which are not reported, and which were carried to appeal. In some of them the documents show that the validity of the Orders in Council was raised and questioned. But in all the appeals the sentences of condemnation were sustained; and in none of them was there a pronouncement against the legality of the Orders. Several of them were decided in March, 1810. The Court then consisted of Sir William Grant, Sir William Wynne, and Sir John Nicholl, except when the appeal was from a Vice-Admiralty Court, when Sir William Scott also formed one of the Court of Appeal. I shall only make mention of one case tried on appeal before this Court of four judges. That is *The Nymph* (1), in which both ship and cargo captured on a voyage to Leghorn were condemned by the Vice-Admiralty Court at Malta. The only ground alleged in the respondents' case as justifying the condemnation of ship and cargo was that the capture was properly made under the Order in Council

(1) (1810) Unreported; see note (8) on p. 185, ante.

of January, 1807. The appeal was dismissed and judgment of condemnation affirmed by the Appellate Court on March 15, 1810.

In 1811 was tried the case of *The Fox* (1), before Sir William Scott. The report in Edwards does not give the argument. But from the judgment it would appear that no argument was made against the legality of the Orders (then the Orders of January 7, 1807, and April 26, 1809). The *Annual Register* of 1811 deals somewhat more fully with the case, and discloses the fact that a similar decision was given in several other cases, similarly circumstanced, and founded upon the same principle. As the *Annual Register* for that year is not always available, the account in so far as it supplements the report in Edwards may, with convenience, be here reproduced. It runs thus :—

"ADMIRALTY COURT, DOCTORS' COMMONS, *June 18th*, 1811. 'THE SHIP *Fox*.'

"The final judgment of the Court in this important case was delivered yesterday morning : it had been delayed in consequence of an expected official communication of the revocation of the Berlin and Milan Decrees, upon which the British Orders in Council were founded, as it was under those Orders that the ship in question was captured. The *Fox* sailed from Boston in the United States on a voyage to Cherbourg : in the prosecution of which she was captured on the 14th November last (i.e. 1810) by the *Amethyst*, frigate under the command of Sir Michael Seymour. A claim was given in by the owners as neutral subjects, and on the 30th May last (i.e. 1811) the case came on for hearing. It was contended, on behalf of the captors, that as the vessel was bound for a port in France, she was violating the British Orders in Council of the 26th of April, 1809, and under those Orders was clearly liable to condemnation. This was opposed by the claimants' counsel upon two grounds : first, that the Orders in Council had ceased to exist, because the French Decrees upon which they were grounded had been revoked ; and next, that if even those Decrees could be considered as still in existence, the circumstances of equity which distinguished this case would justify the Court in relieving the claimants from the penalty imposed by the Orders in Council.

(1) Edw. 311.

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Upon this question the learned judge, Sir W. Scott, delivered a very elaborate judgment a short time since."

A résumé of the judgment is then set out. The account concludes as follows : " The sentence of condemnation was accordingly pronounced in this case, and likewise in several others, similarly circumstanced, and founded upon the same principle."

In his judgment Sir William Scott observed upon the novelty, the magnitude, and the complexity of the Orders in Council, and the attention which they excited both at home and abroad. In view of these well-known facts it is noteworthy that it had not been argued that in their retaliatory character they were at all repugnant to the law of nations, however liable they might be to be so described " if merely original and abstract."

The learned judge said : " Retaliatory Orders they are. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory ; and they would cease to be retaliatory from the moment the enemy retracts in a sincere manner, those measures of his which they were intended to retaliate." Of the measure adopted he said : " It is not an original, independent act of blockade, to be governed by the common rules that belong simply to that operation of law. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. So far this retaliatory blockade (if blockade it is to be called) is co-extensive with the principle ; neutrals are prohibited to trade with the enemy, because they are prohibited by the enemy from trading with England. England acquires the right which it would not otherwise possess, to prohibit that intercourse by virtue of the act of the enemy. Having so acquired it, it exercises it to the full extent, with entire competence of legal authority."

In the next year (1812) the case of *The Snipe* (1) and other American ships captured on voyages to and from France came up for decision in the same Court. The points argued are stated in the judgment as follows : " On the part of the captors it is contended, that the ship and cargo are liable to condemnation under the British Orders in Council. On the part of the claimants it is contended, that the operation of those Orders had ceased, the French

(1) Edw. 381

Decrees, to which they were retaliatory having been repealed, and consequently the British Orders having expired in point of justice and authority, and according to pledges solemnly and repeatedly given by the British Government, that they should cease whenever the French Decrees were actually revoked."

The alleged revocation was elaborately examined, and it was found that it had not been established. All the ships and cargoes captured before May 20, 1812, were pronounced liable to condemnation. Sir William Scott had indeed pronounced judgment in earlier cases which could only be consistent with the view he held that the Orders were valid. I will shortly refer to them in their chronological order.

The Comet (1) was decided in October, 1808. The Court decreed condemnation (under the November, 1807, Order) of a vessel which was going in ballast from New York to Nantes. No doubt the judgment states that Nantes was "subject to a rigorous blockade," but the blockade was described as being under the Order in Council. No notification of a blockade of Nantes had been given. The Order declared that French ports (without naming them) would be treated "as if they were actually blockaded." The epithet "rigorous" was not, I think, intended to describe an actual blockade, but was used as in the penultimate preamble of the Order and in clause I. of the Order itself. This decision was affirmed by the Lords Commissioners on appeal on March 3, 1810, Sir William Grant, Sir William Wynne, and Sir John Nicholl forming the Court.

In *The Mercurius* (2), decided in December, 1808, the validity of the January Order was assumed; and the ship, coming from Bordeaux and intending to go to Bremen, would have been condemned under the Order but for the fact that she was held to have honestly broken the voyage by calling at a British port for a British licence. In *The Luna* (3), decided in January, 1810, the Order of April 26, 1809 (which modified that of November, 1807, by limiting it to the ports of France, Holland, and parts of Italy), was treated as valid. In *The Speculation* (4), decided in April, 1810, a ship and her cargo were condemned under the first Order in Council because

(1) Edw. 32.
(2) Edw. 53.
(3) Edw. 190.
(4) Edw. 184.

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the ship was on a voyage between two Prussian ports from which the British flag was excluded. Apart from that Order they would not have been subject to condemnation. And in the latest stage, in June, 1814, the case of *The Arthur* (1) was decided upon the footing that the Orders of January, 1807, and April, 1809, were valid at the time of capture, in respect of which an alleged joint capture was made.

It is interesting to see how the Government of the United States regarded the situation after the end of the Napoleonic wars. The great Congress of Vienna was attended by all the European Powers except Turkey. When all were settled, Mr. Adams in 1817, being then Secretary of State for the United States, wrote to Mr. Rush, the Minister for England, as follows: "The dereliction of the rights of maritime neutrality by *all* the allied Powers at the Congress of Vienna, and at the subsequent negotiations for settling the affairs of Europe at Paris, have so far given a tacit sanction to all the British practices in the late wars that none of them would have a right to complain if the United States, on the contingency of a maritime war in which they should be engaged, should apply to the neutral commerce of all those allies the doctrines which they thus suffered Great Britain, without remonstrance, to apply against it in her late contest with the United States." Mr. Adams had towards the end of the Napoleonic wars been United States Minister in England, and was acquainted with the whole situation arising between America and other neutral States and Great Britain out of the Orders in Council. He took part in arranging the Peace of Ghent at the end of the war with America, and was afterwards, as is well known, President of the United States.

It will appear from what has been said that the matter in discussion has been regarded from two slightly different points of view; or perhaps, the point of view being the same, the results are expressed in two different forms.

If retaliation is permissible for conduct of a belligerent clearly contrary to the law of nations and of humanity, the acts of retaliation (assuming them to be in the circumstances reasonable) may be described as outside and beyond the limits of the law of nations although justifiable; the alternative view is that the circumstances

(1) (1814) 1 Dods. 423.

which call for such acts of retaliation extend that law so as to cover and comprehend them within its bounds. The latter seems to me to be the preferable view. It is because the retaliation is regarded as forming part of the law of nations that it is cognizable in, and can be enforced by, a Court of Prize.

I now come to modern times.

In the course of the present war the case of *The Fox* (1) was discussed by the Judicial Committee of the Privy Council in *The Zamora.* (2) In the judgment their Lordships made some important and valuable observations upon Orders of reprisal and retaliation. It was strongly contended before me that they were only dicta not necessary for the decision. If it were clear that they formed a ground for the decision my task in the present case would have been easier and shorter. But whether they were mere dicta or not, I should loyally accept their guidance. But beyond this let me add that I respectfully agree with them.

First, how did the judgment deal with the decision in *The Fox?* (1) Although their Lordships dissented from some parts of the judgment of Sir William Scott, they did not disapprove of his decision. On the contrary, they appear to have approved of it, if not expressly, at any rate tacitly, in the following passage: "The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent Power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy.*" (3)

In the next place, as to the doctrine of reprisal or retaliation, their Lordships pronounced as follows: "An Order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best

(1) Edw. 311. (2) [1916] 2 A. C. 77, 94, 98.
(3) (1809) Edw. 122.

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or only means of meeting the emergency ; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience, unreasonable considering all the circumstances of the case."

This judgment was delivered, of course, before the 1917 Order, but after the 1915 Order, which contained the main recital of the facts, afterwards adopted and amplified in the later Order. I have no doubt that their Lordships had directly in their minds the Order of March, 1915, when their judgment was delivered. If so, it is clear that their opinion was that international law justified retaliation by some such Order, although thereby inconvenience—which, of course, includes pecuniary inconvenience or loss—must be caused to neutrals.

For the various reasons which I have given fully, and I fear at too great length, I am of opinion that in the circumstances existing in February, 1917, the recognised guiding principles of international law justified an Order of retaliation against the enemy with the object of curtailing or throttling his trade, although it prescribed measures outside and beyond the ordinary rules of blockade ; that there are good precedents and authority for such an Order ; and that if, in view of the whole situation between the belligerents, the means for carrying it into effect are not excessive or unreasonable against the enemy, the consequential results to neutrals desiring or willing to trade with the enemy give such neutrals no right to complain, or to claim compensation.

Let me add that if such a retaliation was not permissible by the law of nations, it is conceivable that neutral States might, by the exercise of their alleged right to carry on trade with a belligerent without interference, become the actual arbiters of the fate of a disastrous war to which they were not parties, and from which they not only did not suffer loss, but actually achieved gain.

The points that remain can be dealt with much more shortly.

If a retaliatory Order was justified, does the Order in question entail on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case ? A milder Order had been tried, and for nearly two years. It was, as recited, found to be

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insufficient for the avowed and legitimate purpose. His Majesty's advisers thought that the new Order of 1917 provided the best or only means of meeting the emergency. The emergency was of the gravest possible character. The object of the perpetrators of the indiscriminate and unlimited depredations of the submarines was to starve these islands by sinking at sight all ships and cargoes whether neutral or not, and by killing mariners whatever their nationality. It is sufficiently notorious that the chief advisers of this dastardly and inhuman policy promised the German people that the activities of six or eight months would suffice to bring this country to its knees, or to effect its ruin. To adopt a phrase of "Historicus," the German Government by these means looked forward to "creating a terrestrial globe in which the unsymmetrical contour of the British Isles was to be blotted out."

Bearing in mind all these facts, I fail to see how it can be said that the Order in Council was not justified as against the enemy; and if so justified, how it can be said that the consequences, inevitable as they were, thereby entailed upon neutrals are unreasonable, or such as to render the Order illegal.

The first Order did not subject to confiscation the goods or the vessels. The former were to be detained till the end of the war; the latter were left to go free to ply their trade after discharging the goods. It occasions no startling surprise that such an Order was found ineffective against such a determined submarine warfare. When neutral ships were so immune, the enemy's trade, so profitable to owners of ships, was not likely to suffer greatly. The goods of enemy origin or for enemy destination were immovable by sea without the ships. The ships gave life and motion to the trade. If it was right to retaliate by attempting to prevent or destroy the commerce of the enemy, it was necessary that the vessels which engaged in carrying it on to and from the enemy country should come under some disability. A suggestion was made that detention till the end of the war would be sufficient. Who can tell? It may be that it would pay neutrals to have their vessels so detained and saved from the perils of sinking, and to have them delivered up at the conclusion of the war when they might be of an enormously enhanced value. I cannot, by any process of weighing in fine scales facts of which I have far less knowledge

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than the naval advisers, say what the exact Order or measure of retaliation should be. It is enough to say that, according to the best opinion I can form, the present Order is not excessive as against the enemy or in its effect on neutrals. I fail to see how it can be said that the effect on neutrals is excessive or unreasonable when similar disadvantages are imposed on them in many cases of carriage of contraband, in all cases of violation or attempted violation of blockade, and even in all cases of refusal of, or resistance to, visit and search.

I therefore decide against the contention of the claimants that the Order entails unreasonable consequences on neutrals having regard to all the circumstances.

Finally, there is the last contention of the claimants made under two heads :—

First, was the coal of "enemy origin"?

It would be tedious to enumerate the scores of orders made by the German Government for the control of the industries, and indeed all the affairs, of the large part of Belgium of which the enemy is in occupation. As to coal, some of the conditions attached to its sale and disposal have already been stated. It will be sufficient to add that a special order about coal was made by the German Governor of Belgium on April 28, 1915 :—

"1. The distribution of all coal obtained in Belgium, as well as all coke, briquettes, and the sub-products of coke made in Belgium is entrusted to the 'Central Coal Bureau' at Antwerp, which is managed by the Chief of the Administration of the Governor-General. This Bureau can ask the Governor-General to grant authorizations to export.

"2. In order to regulate dealings in the products mentioned in article 1, the producers must put the whole of their productions at the disposal of the 'Central Coal Bureau,' which as intermediary will determine the use to be made of these products.

"The use will be made in accordance with certain rules established by the 'Central Coal Bureau' and approved by the Governor-General. The amount realized by the sale will be paid to the vendors.

"To cover the costs of organization and administration of the 'Central Coal Bureau' there will be levied a tax to be determined

by the Chief of the Administration taking into consideration the total amount of the sales.

"3. Producers are forbidden to carry out contracts of sale made by them. A contractor who cannot fulfil his obligations by reason of this order shall not be liable to pay damages.

"The 'Central Coal Bureau' can make exceptions to this order in the case of contracts made for the purpose of enabling the buyers to cover their actual requirements, the existence of which must be proved by them.

"4. Any one who tries to keep the products in question from being used in accordance with article 2 will be punished by a fine not exceeding 10,000 francs.

"The amount of the fine will be determined by the Governor-General, who, besides this penalty, may confiscate the products the subject of the offence.

"If this confiscation is impossible, the offender must pay the value of the goods confiscated, and if their value cannot be determined, he must pay a sum corresponding to their probable value.

"5. The present order comes into force at once."

The evidence shows that the Brussels Coal Department exercised complete control over the coal. It was suggested, though not proved, that the department paid some Belgian people interested in the collieries for the coal; but the German department had the full dominion over it, and were to all intents and purposes the owners, and acted in this particular contract as the vendors.

Some authorities were cited for the claimants as to the effect of the military occupation of a country by a belligerent upon the status of residents. These are beside the point. What I have to do is to ascertain what is comprehended in the phrase "of enemy origin" in the Order in Council. If the original Belgian owners of the collieries had been permitted to work it themselves and to produce and dispose of it for their own profit, and if they had sold it to a German Government department, or even a German commercial concern, and these latter had sold it for export, even then I think the coal would have been "of enemy origin" within the meaning of the Order in Council: a fortiori, in the facts of this case the origin was "enemy," in my opinion. The contention of the claimants on this head therefore fails.

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The second head, and the last question to be considered, is whether the Order is invalid because no British or allied port had been appointed at which the vessel might call for examination.

In order to clear the ground, I observe here that this point does not in any circumstances affect the confiscability of the goods. If they were of enemy origin they would in any event be subject to condemnation. This last contention was, and could only be, put forward on behalf of the owners of the vessel. It was submitted that the "appointment" of a particular port should have been made with or immediately following the Order, so as to form part of it, and that such an appointment was a condition precedent to the liability of the ship to condemnation.

It is best first to find the facts, and then to examine the legal contention.

In fact no appointment of a particular port had been made, nor had any application been made to the British authorities for the appointment of any port of call for vessels trading between Holland and Scandinavia. None of the vessels employed in the carriage of coal from Dutch ports to Scandinavia have voluntarily called, or offered to call, at British or allied ports for examination. It will be remembered that over 25,000 tons—I think I said more than half—had been carried under this very contract before the *Leonora* was seized. That is to say, there had already been about fifteen voyages in ships carrying this coal assuming them to have been of equal capacity with the *Leonora;* and seven more vessels were captured in the following month. A large number of ships were thus employed to carry Belgian and German coal from Dutch ports to Scandinavia by sea in order to relieve the German railways. For particulars as to this, and the exchange traffic, reference may be made to the affidavit of Captain Longden, R.N., sworn on November 2, 1917. It is of interest also to note the statistics given in Captain Longden's second affidavit, which show that in the first ten months of 1917 licences had been granted for export from Great Britain to Sweden of over 700,000 tons of coal in accordance with definite orders and contracts from Swedish buyers, but that only 480,000 tons were taken; and moreover that licences for larger quantities would have been granted if orders had been given and the requisite amount of Swedish tonnage had been

provided to ship the coal. In July and August alone the licences covered 130,000 tons, whereas only 84,000 tons were shipped. If it were necessary to pronounce a decision upon the proviso, I should hold that it does not mean that a port should be appointed to suit all vessels and voyages, and that such an appointment should form, so to speak, a part of the Order.

It would seem to be so difficult as to make it quite impracticable to name once and for all one or more British or allied ports of call for all vessels trading to or from all ports affording access to enemy territory. But if any vessel desired to call at a British or allied port for examination, information could easily have been obtained at a port like Rotterdam ; and if after the Order in Council any vessel had in fact called at any port in the United Kingdom, her cargo would have been examined there. But the truth, and the uncontested truth, is that those interested in the *Leonora* and her cargo had no intention whatever of calling at any British port ; on the contrary they protested against being required or asked to do so. The master of the vessel deposed that he had been informed by Mr. de Poorter's office (i.e. the shipowners), and had also received written instructions from Mr. de Poorter, that the voyage was to be *direct from* Rotterdam to Stockholm, and that he could not deviate. Indeed, he explained that his sailing permit made it unlawful for him to call at a British port, and that if he had done so it would have entailed a "prison sentence" in his case, as well as serious penalties and consequences to his owners, including a penalty of imprisonment for the manager, who apparently was de Poorter himself. The master, it is true, said that he had not heard of the Order in Council until after the seizure. But even if that were the fact, it would not alter the situation.

Moreover, it was not suggested that Mr. Jos. de Poorter and the claimants, Beijers, were unaware of the Order which had been promulgated about seven months before. Jos. de Poorter is a large shipowner at Rotterdam, and as such has no doubt followed with critical attention the various regulations as to mercantile shipping. He who alone advances the contention now under consideration never dreamt of availing himself of any opportunity which was open, or which might be offered of submitting his ship for examination at a British port. His sympathies and activities have been on

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the other side of the North Sea. Two of his vessels were used to coal German cruisers off South America early in the war. One of them was condemned by the Prize Court of the Falkland Islands in January, 1915. The other (the *Alwina*) formed the subject of prize proceedings in this Court and in the Privy Council in 1916 and 1918. (1) This latter ship was released by me on grounds of law, but de Poorter was ordered by reason of his conduct to bear and pay the costs and expenses of and incident to the capture and detention, and also of and incident to the prize proceedings. This order was approved by the appellate tribunal. Their Lordships approved of the following statement in the judgment of this Court upon the facts: "The correct finding, in my view, is that the vessel, being a neutral vessel, was carrying contraband, namely, coal, intended to be delivered to enemy agents, or enemy vessels of war encountered on the voyage; and that she was so carrying the contraband with false papers, with a suspicious supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. . . . . What is clear is that de Poorter, the shipowner himself, was an active party in the attempt to convey the contraband to the enemy by the false and fraudulent tricks and devices which were adopted." (1)

I also find on reference to the Statutory List of this country (sometimes called the Black List) that de Poorter was placed upon the first of such lists on February 29, 1916.

What I have called the cardinal feature and the operative part of the Order in Council is the first part of clause 2. That is the retaliatory provision destined to bring pressure on the enemy by stopping his trade. (I may observe in passing that Mr. Schonmeyer, who had to a great extent the charge of the claimants' cases, attested the effect of this pressure when he said in an affidavit that after the seizure of the *Leonora* the neutral shipping between Holland and Sweden was forced to stop because the ships would not continue if they had to go to a British port for examination.) The proviso in the clause is a relaxation in favour of neutral shipowners who wish to show their bona fide neutral conduct by voluntary submission to examination at an English port. It is in no sense a condition precedent to the enforcement of the substantive part

(1) [1916] P. 131, 140; [1918] A. C. 444, 449.

of the clause. If it were, the claimants would have to show their readiness and willingness to comply with its terms. Claimants cannot be heard to say, "True, we were carrying goods of enemy origin, and so running the risk of capture and condemnation under the retaliatory Order; true, that we were proceeding di ect from one port to another both of which afforded access to enemy territory; true, that nothing would have induced us to call at any British port for examination; true, that we never asked or intended to ask that such a port should be appointed or named for our vessels; yet, as you had been good enough to promise a relaxation in certain events which did not happen, and the occurrence of which we would make sure should not happen, the Order must be disregarded altogether." That was the contention in substance for the claimants upon this head. I think it wholly unwarranted.

This brings this lengthy judgment to an end. My task is done. The case is one of importance, of interest, and of some delicacy and difficulty. The preparation for it was facilitated by the able arguments at the Bar, which I wish very gratefully to acknowledge. I have, of course, given the case the most careful consideration in all its aspects. If there have been errors in the principles which have guided this judgment, or in the application of them, it is a consolation to know that the parties affected have the right to put their claims again to the test before another and a higher tribunal.

The judgment of the Court is that the ship and cargo be condemned as good and lawful prize.

Solicitor for Procurator-General: *The Treasury Solicitor.*
Solicitors for shipowners: *Guedalla & Jacobson.*
Solicitors for cargo owners: *Botterell & Roche.*

E. C. T.

C. A.

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April 15, 16, 17.

[IN THE COURT OF APPEAL.]

SLINGSBY *v.* ATTORNEY-GENERAL (T. W. SLINGSBY AND A. P. SLINGSBY, PARTIES CITED).

Practice—Costs—Taxation—"Instructions for Brief"—Details to be stated in Bill—Lump Sum Charge—Items chargeable not distinguished from Items not chargeable—Insufficiency of Materials to enable Taxing Master to exercise Discretion—Duty of Taxing Master—Payments to Foreign Lawyers—Reasonableness of Charges—Onus of Proof—Attendances on Counsel where no Fee charged.

Although it is well settled law that the Court will not interfere with the exercise of a discretion by a taxing Master where he has not acted on any wrong principle or applied any wrong consideration, yet where the Court is satisfied that the bill brought in for taxation does not contain the necessary materials to enable him reasonably to exercise his discretion it will direct the bill to be amended and the taxing Master to review his taxation of the bill so amended.

In order to enable a taxing Master to form a considered judgment as to the sum that is proper to be allowed under the heading "Instructions for Brief" the bill of costs carried in for taxation should contain under that heading a summary statement of the details of the matters to which regard is to be had. It should state the length of the documents to be perused (in cases in which perusal has not been previously charged), the names of the witnesses who have been attended, the places to which journeys have been made with the time occupied in each, and the amount of travelling expenses.

Attendances by a solicitor on counsel at conferences in respect of which no fees are charged cannot be charged for.

In re Catlin (1854) 18 Beav. 508, 516, followed.

Where the items of a bill are so inextricably mixed up one with another that it is impossible to say what is really chargeable or what sum ought fairly to be allowed in respect of the items chargeable, the proper course for the taxing Master to adopt is to reject the bill and to require the solicitor to remodel it by stating the charges he seeks to be allowed with details of the work and (where usual and necessary) details of charges.

Where payments have been made to foreign lawyers, the burden is on the party bringing in the bill and claiming to be allowed the amount of such payments to show that the amount is fair and reasonable and ought to be allowed. It is not for the taxing Master

to allow the amount merely because it has been paid, or because the other side have not produced evidence to show that the charge is excessive.

Decision of Coleridge J. reversed.

APPEAL from an order of Coleridge J. on a summons to review taxation.

On May 2, 1913, a petition was presented by Charles Eugene Edward Slingsby, an infant, by his next friend, Charles Henry Reynard Slingsby, under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), seeking to establish that he was the lawful child of C. H. R. Slingsby and Dorothy Morgan Slingsby, and that he was therefore tenant in tail male in remainder expectant on the death of his father of the Slingsby estates. The respondent and parties cited, uncles of the petitioner, alleged that the petitioner, so far as regarded C. H. R. Slingsby and his wife, was a wholly supposititious child and had been falsely passed off since 1910 as the lawful child of C. H. R. Slingsby. The parties cited were Thomas William Slingsby and Alan Peter Slingsby.

The petition was tried before Bargrave Deane J., who gave judgment in favour of the petitioner, but his judgment was subsequently reversed by the Court of Appeal, which by an order dated March 16, 1916, directed that the costs of the parties cited both in the Court of Appeal and in the Court below should be paid by C. H. R. Slingsby, the next friend.

The bill of costs brought in for taxation by the solicitors of the parties cited contained (inter alia) two items to which objection was taken. One was an item of 1365*l.* which was brought in as a lump sum in respect of "instructions for brief," and the other was an item of 3890*l.*, which was also brought in as a lump sum in respect of payments to American lawyers, but which was accompanied by a statement extending over some forty-nine pages showing how that amount was arrived at. As regards the first item the registrar had taxed off 630*l.* and had allowed it at 735*l.* As regards the second item he had taxed off about 1897*l.* and had allowed the item at about 1993*l.*

On January 10, 1918, C. H. R. Slingsby took out the present summons to review the taxation, which was heard before Coleridge J., who affirmed the decision of the registrar in respect of the two items above referred to. The applicant appealed.

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The facts and the nature of the appellant's objections to the taxation and the registrar's answers thereto are fully stated in the judgment of Swinfen Eady L.J.

Schiller, K.C., and *E. W. Hansell*, for the appellant.

J. M. Gover, for the parties cited.

[The following authorities were referred to :—*Wentworth* v. *Lloyd* (*No.* 2) (1); *In the Estate of Ogilvie* (2); *In re Roney & Co.* (3); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4); *Carter* v. *Apfel* (5); King on Costs on the High Court Scale, p. 37.]

SWINFEN EADY L.J. This is an appeal by the next friend of the infant from an order of Coleridge J. on a summons to review taxation. In so far as that summons was refused, the appellant appeals. The proceedings were commenced in the name of an infant, Charles Eugene Edward Slingsby, by Commander Slingsby, his next friend, seeking to have a declaration of the infant's legitimacy pursuant to the provisions of the Legitimacy Declaration Act, 1858. On appeal the proceedings failed, and the costs were ordered to be paid by the next friend, and it is the bill of costs brought in for taxation under that order to which the present proceedings relate. The next friend under the terms of the order has to pay the party and party costs incurred in the proceedings and directed to be paid. The bill of costs as brought in contains two items—one is an item of 1365*l.* and the other is an item of 3890*l.*; and it is with reference to part of those two items that the present appeal is brought. The first item, "Instructions for Brief," contains certain details with regard to the "instructions for brief," and is followed by a claim of 1365*l.* as a lump sum. The registrar has dealt with that by taxing off 630*l.* and allowing 735*l.* as a lump sum for the charges. Objection is taken to his taxation, and he deals with it in this way in his answer: "I have carefully considered this case, which, in my opinion, was an extremely difficult and complicated one, and I am of opinion that the sum I have allowed is a proper figure." That is the whole answer to the objection. I think it is well settled that the Court will not interfere

(1) (1865) 34 Beav. 455.
(2) [1910] P. 243.
(3) [1914] 2 K. B. 529.
(4) (1889) 60 L. T. 753.
(5) (1912) 57 Sol. J. 97.

with the exercise of a discretion by a taxing Master where he has not acted upon any wrong principle or applied any wrong consideration. The allowance to be made for " instructions for brief " is a matter peculiarly within the discretion of the taxing Master, and, as was said by Buckley L.J. in *In the Estate of Ogilvie* (1), " On questions of quantum the decision of the taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision." That is the practice. The decision of the taxing Master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise.

In the present case, in my opinion, the bill has been improperly made out, and the registrar has not had before him the proper materials upon which he could reasonably exercise his discretion. The bill is made out by including in general terms, and sometimes specifically, a large number of details which are obviously wrongly included. Only one lump sum is charged, but a large number of the details are obviously erroneous and ought not to be included in the costs. The bill of costs is assumed to be the bill of costs incurred in the litigation for a declaration of legitimacy. That litigation commenced with the presentation of the petition on May 2, 1913, which was served in the following June. Previously to that petition being presented various proceedings of different kinds had taken place in the United States of America, Mrs. Slingsby claiming to have been delivered of the infant petitioner as her natural and lawful child. There were proceedings taken with regard to the registration of the child's birth. The child having been alleged to have been born in the month of September, 1910, proceedings were instituted in 1911 which were in the nature of an official inquiry before Dr. Snow with regard to the correctness of the register from which the certificate of birth was taken. Those proceedings terminated in December, 1912, when Dr. Snow altered the register or directed it

(1) [1910] P. 243, 245.

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to be altered. Then there were proceedings with regard to a certain Dr. Fraser, who was alleged to have given a false certificate with regard to a child. These were of a criminal nature either instituted or attempted to be instituted. They were taken to the Court of Appeal in California, and by a decision of that Court given on October 25, 1913, a demurrer to those proceedings was ultimately allowed. Then there was a third set of proceedings, proceedings before the grand jury with regard to an inquiry upon which the district attorney had embarked, in which witnesses who either had been or were about to be examined in America upon a commission then issued to take evidence in the present proceedings were subpœnaed to attend before the grand jury. Then in opposition to that proceedings were taken in order to procure a judicial decision that the proceedings so instituted before the grand jury by the district attorney ought to be stayed as really tending to interfere with the due administration of justice and to intimidate the witnesses. All those proceedings were taken in America, and were in addition to the examination of witnesses on a commission to take evidence for the purpose of the present issue. Under the heading " Instructions for Brief " a large number of entries are made with regard to the earlier steps that were taken a considerable time before May 2, 1913, when these proceedings were instituted. There are also entries with regard to the steps to be taken in advance of the litigation threatened and then contemplated but not begun, entries including a case to eminent counsel to advise on evidence, the preparing of a case for counsel, Sir Robert Finlay, to advise as to further evidence, and very lengthy correspondence with various persons. Page after page of this bill contains particulars leading up to the lump sum charged under the heading " Instructions for Brief," which obviously ought not to be so charged. Then, merely to mention as another instance, there is also an entry after the institution of the present proceedings that ought not to form part of any charge for " instructions for brief "— that is, a long consultation with leading counsel and two junior counsel with regard to evidence. In my opinion, the heading " Instructions for Brief " is intended to cover those items, the nature of which is thus stated by Master King in his book on Costs on the High Court Scale at pp. 37, 38 : " A summary statement in the bill carried in for taxation of the details of the matters to which regard

is to be had under this item "—that is, under the item "Instructions for Brief"—"greatly facilitates the task of arriving at a proper allowance." Then he refers to *Hill* v. *Peel.* (1) "The length of the documents perused (in cases in which perusal has not previously been charged), the names of the witnesses who have been attended, the places to which journeys have been made, with the time occupied in each, and the amount of the travelling expenses, should be stated." If those details are given in the bill it enables the Master to form a considered judgment as to the sum which is proper to be allowed under the heading "Instructions for Brief." That has not been done in the present case, and the items are so involved and so mixed with items which manifestly ought not properly to be included at all that it is clear that the registrar had not before him the materials upon which he could properly exercise his discretion.

It was settled as long ago as the year 1854 by the case of *In re Catlin* (2) that with regard to attendances on counsel it is not proper to allow for such attendances where no fee is payable to counsel. That case is often referred to as it settled numerous points of practice in the Taxing Office. The Master of the Rolls there (3) dealt with certain items for attendances on counsel from time to time, no fee being payable to counsel in respect of any of them, in respect of which it was urged on behalf of the solicitor that the charges were proper, that the work was done, and that the attendances ought to have been allowed for and not taxed off. The Master of the Rolls says: "It is urged by Mr. Catlin that counsel frequently send for the solicitor to confer on various matters of importance to the client, but do not charge any conference fee; but that the time of the solicitor is taken up, and that he ought to be allowed for his attendances. After some hesitation, I think that the first five of these items were properly disallowed. It is, I am informed, the invariable practice to strike them off, and that it has never been considered right, and that it is not usual to charge for those conversational attendances. I am also induced to believe, that it might lead to dangerous results to alter the practice in this respect." That was, as I have said, in 1854, and Master King states that since that time

(1) (1870) L. R. 5 C. P. 172. (2) 18 Beav. 508.
(3) 18 Beav. 516, 517.

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that has been the invariable practice. He says (1): "On the other hand, no allowance is made for 'conversational attendances' on counsel, even at his request, where no fee is charged (*Re Catlin* (2)), though there seems to be a good deal in Mr. Catlin's contention that the time of the solicitor is taken up and that he ought to be allowed for his attendances, and Lord Langdale (3) sustained the disallowance after some hesitation and apparently rather with regard to precedents than to propriety. There is no reason why generosity on the part of counsel should necessarily induce a similar sacrifice on the part of the solicitor, particularly since the process is not reciprocal." Then he adds: "But the practice is well settled in accordance with the decision of *In re Catlin*." (4) That has been the invariable practice of the Taxing Office. I only mention that as an illustration because here items of that sort are mixed up with those in question. In my opinion, what the registrar should have done with this bill, brought in as this was with items so inextricably mixed up one with another that it was impossible to say what was really chargeable or what sum ought fairly to be allowed in respect of the items chargeable, was to reject the bill and to direct the solicitor to bring in a bill redrawn.

The other item objected to is a portion of the lump sum charge of 3890*l.* That is brought into the bill of costs as one sum, but it is accompanied by a statement of how the amount was arrived at occupying some forty-nine pages. That sum 3890*l.* is made up of certain charges by different firms of American lawyers and payments made by one or other of those firms. It includes charges of and disbursements by Messrs. Pooley, Luxton & Pooley, a firm of solicitors in Victoria, British Columbia, a firm of Andrew Thorne, or a firm of which Mr. Andrew Thorne was a member, at San Francisco, and a third firm of Knight & Heggerty. The registrar has dealt with the matter in this way. The item works out at, I think, $19,446 or thereabouts, and he takes off $9483 or thereabouts, leaving the item at $9963, which is a little under 2000*l.*; in other words, he takes off about 1897*l.* and allows the item at about 1993*l.* In answer to the objection with regard to this the registrar

(1) King on Costs on the High Court Scale, p. 129.

(2) 18 Beav. 517.

(3) This is a mistake for Sir John Romilly M.R.

(4) 18 Beav. 508.

says: "In this case the bulk of the evidence was taken in America, and the charges for the work done there, in my opinion, are payable unless it is very clearly shown either that the charges are excessive according to the scale of charges payable in that country or that any particular charge related to an issue not relevant to the matter before the Court." And so with regard to the other portions of the same item he says that the proceedings were relevant to the issue before the Court; or, varying the language, he says: "I cannot say that this item was irrelevant to the issue, and I allow it." That answer is repeated in another place: "I cannot say that this item was irrelevant to the issue, and I allow it." I think it is right to say the registrar has gone wrong in principle. The claim is one to be allowed considerable sums, in respect of payments made to foreign lawyers, in a party and party taxation, and the burden is on the parties bringing in the bill of costs and claiming to be allowed the amount charged therein to show that the amount is fair and reasonable and ought to be allowed. It is not for the registrar to allow the amount merely because it has been paid, or because the other side have not produced evidence to show that the charge is excessive. The charges in the present case included in various items extend to and include charges for a considerable amount of work which, not being subsequent to the commencement of these proceedings, is not part of these proceedings at all. It is not necessary to go through the various items in detail, but some of them are items which strike one as extravagant as being in the bill, not only with regard to the question of the time at which the work was done, but with regard to the nature of the details of the work, such as the item for influencing the Press either by writing or suggesting articles on matters relating to the proceedings in California. With regard to these items, I am of opinion that the registrar has proceeded on a wrong principle, and that the same course with regard to these items ought to be adopted as in the case of the other items, namely, that the bill ought to be remodelled by the solicitor, and that he should be required to bring in a statement of the charges that he seeks to be allowed in respect of this party and party taxation, with details of the work and of the charges. Again, when the bill is brought in containing a large lump sum without showing in detail how much was charged in respect of the various items and including many items incurred

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previous to the commencement of the present litigation, reference is made to the lawyer in America, who gives his opinion as to how much ought to be deducted from his bill from that lump sum charge in respect of those anterior charges, and the registrar makes the deduction accordingly. In my opinion that is not proceeding on a proper principle. Details of charges should be given with the sums charged for all the various matters, and upon that the registrar should exercise his discretion.

I have not forgotten the argument which was pressed upon us by Mr. Gover that this was a case in which a number of witnesses were to be examined, and that a broad view ought to be taken of the matter and a considerable sum allowed for "instructions for brief" by way of a lump sum; but it must be remembered that the great bulk of the witnesses were examined in America, and that it was the American lawyers who were conducting that part of the case. So far as the witnesses called in England by the parties cited are concerned, we were told that there were only two, a doctor who was called as a medical expert and one of the parties cited. The proper course, therefore, will be in general terms to allow the appeal, refer the matter back to the registrar to review his taxation in respect of these two headings "Instructions for Brief" and "Payments to American Lawyers," and then for the solicitor to bring in a bill showing in detail the items with the prices charged which are sought to be allowed, as far as the latter heading is concerned, and as regards the heading "Instructions for Brief" to give particulars of the work he claims to have done in respect of which a lump sum is to be charged and is proper to be allowed as and for "instructions for brief."

BANKES L.J. I agree, and I wish to add one or two observations, because of what Mr. Gover said to us with reference to interfering with a matter which is properly a matter for the discretion of the registrar. If I could be satisfied that the registrar had dealt with these questions on the right principle I would not for one moment interfere or attempt to interfere with the exercise of his discretion, however much I disagreed with the result at which he had arrived, but it appears to me manifest on these materials that the registrar has proceeded upon an entirely wrong principle. The bill that he has

had to deal with was a bill which commenced with items; the first for which a definite charge was made was under date June, 1913, and there is no definite charge for any work done at any time prior to that date. The only reference to work done prior to that date was under the general heading "Instructions for Brief," for which there were no detailed charges made in respect of various matters mentioned, but there was a lump sum charged of 1365*l*. We are told—and if this is accurate I think it indicates that the registrar did proceed upon a wrong principle—that the registrar commenced by saying that on this taxation no costs incurred before the date of the presentation of the petition could be charged against Commander Slingsby. There were no such charges before that date as separate charges; the only reference to work done before that date was under the general heading of "Instructions for Brief." I cannot understand what was in the registrar's mind if he really did make that ruling, unless it was that he thought he was justified in taking into consideration all these various unpriced items entered under the general head of "Instructions for Brief," on the ground that they were items having some reference to a date subsequent to May 2. If he took that view, and if he did give this ruling on those items, it seems to me that he started on a wrong principle.

The next point is this: The bill under the heading of "Instructions for Brief" is made out in a way which did not present to the registrar materials upon which he could, in my opinion, properly exercise his discretion. I think the course he ought to have taken was the one indicated by Swinfen Eady L.J., namely, to have sent back the bill in order that it might be prepared in a way which would give him the materials upon which he could exercise his discretion. Consider what the position was under this heading and the information he had before him in this bill. The position was that the greater part of the work of getting up the case and obtaining the evidence had to be done in America. It was done by two firms, but particularly by a Mr. Thorne and his firm so far as San Francisco was concerned. The preparation that had to be made in this country in reference to the commission and the taking of the evidence on commission was a matter which the registrar ought or might be asked to take into account in considering what charges ought to be allowed in a party and party bill. You

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find if you look at the bill that there are priced items in respect of work done in this country with reference to taking out the commission, and priced items with reference to the communication with Mr. Thorne in reference to the taking of the necessary evidence on the commission, and there is also an entry for which a very small charge is made under the date of August 13, "Attending Mr. Thorne in London," and therefore indicating that Mr. Thorne must have been in London on that date for the purpose, presumably, of being instructed before the evidence was taken on commission. But the bulk of the work, as I have indicated, had necessarily to be done in America, and for that a separate charge has been made independently by the American lawyers, and that has been considered separately by the registrar and paid for. Any work that remained to be done in this country by the solicitors, either in respect of the necessary preparation for the taking of the evidence on commission, or after that evidence had been returned in relation to the preparation for trial, would properly be matters which the registrar was entitled to take into consideration if he was directing himself properly, if I may use that expression, which is, I suppose, another way of saying if he was acting on a right principle. If these were the only matters it seems to me very difficult for him to have come to the conclusion that the case was an extremely difficult and complicated one; and that again leads me to the conclusion that he has not had the materials which would enable him to direct his mind to the real points, but that, in the absence of the materials which would have kept him within a right principle, he has allowed himself to consider generally the nature and the importance and, from some points of view, the complicated character of the case. Those are not matters which upon any proper principle he ought to have taken into consideration when he was considering these particular items under the heading "Instructions for Brief." Under those circumstances I agree that the matter ought to go back in order that the proper materials may be before the registrar on which he is to be asked to exercise a discretion as to what are the proper party and party matters to be taken into consideration under this particular heading of "Instructions for Brief." With those materials before him he will no doubt consider the question, and award such a sum as in his discretion he thinks proper.

NEVILLE J. I agree that this bill ought to go back to the registrar. I think that the charges made by the bill are not sufficiently precise, and that the observations of the registrar in answer to the objections are unsatisfactory.

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Appeal allowed.

Solicitors: *Janson, Cobb, Pearson & Co.; Gray & Dodsworth.*

W. I. C.

[IN THE COURT OF APPEAL.]

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ANGHINELLI *v.* ANGHINELLI.

Judicial Separation — Jurisdiction — Matrimonial Home — Residence within Jurisdiction at Commencement of Suit—Power of Ecclesiastical Court to grant Relief—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 7, 22.

By the Matrimonial Causes Act, 1857, s. 22, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief . . . ."

In proceedings for a divorce a mensa et thoro on the ground of cruelty, where the parties resided within the jurisdiction at the commencement of the suit, an Ecclesiastical Court would have granted relief irrespective of their domicil.

The petitioner for a judicial separation had been, before her marriage, a domiciled Englishwoman. Her husband's domicil was alleged to be Italian. He was engaged as a traveller for a London firm, and his time was principally occupied in travelling abroad on the business of the firm. When not so travelling he lived with the petitioner at a house in London. At the commencement of the suit both parties were resident within the jurisdiction:—

Held, that the Divorce Division, exercising the power of the Ecclesiastical Court under the section, had jurisdiction to entertain the suit.

Semble, a decree for judicial separation does not affect the status of the parties.

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Armytage v. *Armytage* [1898] P. 178 approved and followed.
Niboyet v. *Niboyet* (1878) 4 P. D. 1 discussed.
Decision of Horridge J. affirmed.

APPEAL from a decision of Horridge J.

On February 22, 1918, the petitioner, Ann Anghinelli, presented a petition against her husband, Gabriello Anghinelli, for judicial separation on the ground of cruelty.

On March 2 the respondent entered an appearance under protest, and on March 11 filed an act on petition in which he alleged that he was born of Italian parents and had his domicil of origin at Fiesole in Italy and had never abandoned it; that his time had been principally occupied in travelling for a London firm in various countries of Europe, Africa and North and Central America; that he took a house, 93, Clapton Common, at the request of the petitioner's parents to afford the petitioner a temporary home, and that he never intended to make a permanent home in this country, and had always intended to return to Italy to make his permanent home in Florence as soon as his business arrangements would admit of his doing so. He accordingly prayed that the petitioner's petition should be dismissed on the ground that the Court had no jurisdiction to entertain it.

It appeared that the petitioner, a domiciled Englishwoman, was married to the respondent on April 20, 1912, at the parish church of St. John, Hackney, and had lived and cohabited with him at 93, Clapton Common. There was one child of the marriage, born in May, 1914. At the commencement of the suit both parties were resident within the jurisdiction.

On March 19 the petitioner took out a summons against the respondent to show cause why his act on petition should not be dismissed and why the petitioner should not have leave to proceed with her petition.

On March 22 the summons was heard by the registrar, who dismissed the respondent's act on petition and gave leave to the petitioner to proceed with her petition. On an appeal by the respondent the order of the registrar was, on April 15, affirmed by Horridge J.

The respondent appealed. The appeal was heard on May 13, 1918.

Hume-Williams, K.C., and *T. Boston Bruce*, for the respondent. The jurisdiction of the Court to grant decrees for judicial separation now depends upon the Matrimonial Causes Act, 1857. By s. 7 of that Act decrees for judicial separation are substituted for decrees for divorce a mensa et thoro, and by s. 22 it is provided that in all suits and proceedings other than proceedings to dissolve any marriage the Divorce Court is to proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief. The precise point raised in the present appeal was decided adversely to the respondent in *Armytage* v. *Armytage*. (1) It is submitted, however, that that case was wrongly decided.

[DUKE L.J. It has constantly been acted upon.]

It must now be taken to be settled law, notwithstanding the decision of the majority of the Court of Appeal in *Niboyet* v. *Niboyet* (2), that the Court has no jurisdiction to grant a decree of divorce where the parties are not domiciled within the jurisdiction: *Le Mesurier* v. *Le Mesurier* (3); *Bater* v. *Bater*. (4) Divorce alters the status of the parties both as regards each other and the community. For the same reason, it is submitted, the Court has no jurisdiction to grant a decree for judicial separation where the parties are not domiciled within the jurisdiction.

[DUKE L.J. referred to Shelford on Marriage Divorce and Registration (ed. 1841), p. 486.]

We rely on the statement of Brett L.J. in *Niboyet* v. *Niboyet* (5) that "It follows from the nature of the subject-matter, that laws which, for certain enacted or predicated causes, as distinguished from causes agreed upon between the parties, alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural born subjects of the enacting country or foreigners who have become domiciled in it; but they may, consistently with principle and the universal consent of nations, bind both of these." The view that the lex fori governs judicial separation is in conflict with the view expressed by Lord Watson in

(1) [1898] P. 178.
(2) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1906] P. 209.
(5) 4 P. D. 12.

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Harvey v. *Farnie* (1) that " questions affecting the status of married persons must be determined according to the law of the husband's domicil," for a judicial separation affects the status of the wife inasmuch as it enables her to acquire a separate domicil: *In re Mackenzie* (2); see also *Barber* v. *Barber*. (3) *Harvey* v. *Farnie* (4) was not referred to in *Armytage* v. *Armytage*. (5)

[DUKE L.J. referred to ss. 25 and 26 of the Matrimonial Causes Act, 1857, as showing the effect on a wife of a decree for judicial separation.]

The statement of Lord Watson in *Le Mesurier* v. *Le Mesurier* (6) that the weight of opinion among international jurists is to the effect that the Courts of the residence are warranted in giving a remedy of judicial separation without reference to the domicil of the parties is not in accordance with Bar's Private International Law, translated by Gillespie, 2nd ed., s. 173, p. 381; Bishop on Marriage and Divorce, vol. 2, s. 68, p. 33; Laurent, Droit Civil International, vol. 5, s. 119, p. 244; and Dalloz, Jurisprudence Générale, vol. 5, s. 140, p. 348. The same considerations do not apply to the case of restitution of conjugal rights as to the case of divorce or judicial separation, and therefore domicil is not necessary to give the Court jurisdiction. A decree for restitution of conjugal rights does not affect the status of the parties. They still remain husband and wife.

Sir Edward Marshall-Hall, K.C., and *W. O. Willis*, for the petitioner, were not called upon.

SWINFEN EADY M.R. This is an appeal from an order of Horridge J. affirming a decision of the registrar dismissing an act on petition of the respondent, the husband. The petition was presented by the wife praying for a decree for judicial separation. The husband is a domiciled Italian and was married to the petitioner on April 20, 1912. There is one child of the marriage. On February 22, 1918, the wife presented a petition for judicial separation alleging cruelty. In her petition she alleged that she, being a domiciled Englishwoman, married her husband, who was a domiciled Italian, that after the marriage they lived together at 93, Clapton Common.

(1) (1882) 8 App. Cas. 43, 62.
(2) [1911] 1 Ch. 578, 591–594.
(3) (1858) 21 Howard, 582.
(4) 8 App. Cas. 43.
(5) [1898] P. 178.
(6) [1895] A. C. 526.

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She then sets out the acts of cruelty complained of and prays for a decree for judicial separation. The husband by his act on petition alleging that he was born of Italian parents at Fiesole in Italy, and had there his domicil of origin which he had never abandoned, prayed that the petition might be dismissed on the ground that the Court had no jurisdiction to entertain it.

A summons by the petitioner to dismiss the respondent's act on petition came before the registrar, who dismissed it, and his decision was affirmed by the judge.

The ground on which the husband alleges that the Court has no jurisdiction is that he being domiciled in Italy the effect of the decree, if granted, might be to affect the status of the parties, and he asks the Court to lay down the rule that in all proceedings in the matrimonial Courts the jurisdiction must be founded on domicil, and that as domicil governs the forum of divorce so it must govern all matrimonial proceedings which may ultimately affect the status of the married parties. The appellant contended that the effect of a decree for judicial separation might be to enable the wife to acquire a domicil apart from her husband and thus affect the status of the parties, that the judgment was therefore erroneous, and that the Court had no jurisdiction to entertain the petition.

The jurisdiction of the Divorce Court is conferred by the Matrimonial Causes Act, 1857. By s. 6 it is provided that "All jurisdiction now vested in or exerciseable by any Ecclesiastical Court or person in England in respect of divorces a mensa et thoro, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty; and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court of record to be called 'The Court for Divorce and Matrimonial Causes.'" Then by s. 7, "No decree shall hereafter be made for a divorce a mensa et thoro, but in all cases in which a decree for a divorce a mensa et thoro might now be pronounced the Court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce a mensa et thoro now has." Then s. 22 enacts: "In all suits and proceedings, other than proceedings to dissolve any

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marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

The effect of those sections is to transfer to the Divorce Court the jurisdiction formerly exercised by the Ecclesiastical Courts, and to require that Court in all suits and proceedings other than those for dissolution of marriage to act upon the same principles and rules as did the Ecclesiastical Courts. Therefore the only question which arises on this appeal is whether before the Act of 1857 the Ecclesiastical Courts would have allowed to be maintained a suit for divorce a mensa et thoro where the parties were resident here but domiciled abroad. The authorities clearly establish that they would; and they even go further and hold that where the parties are domiciled abroad, and the offences complained of are committed abroad, but the parties have since come to reside in this country, the Court may give this relief.

The grounds upon which the Ecclesiastical Courts proceeded in granting relief are fully stated in *Niboyet* v. *Niboyet*. (1) James L.J. there says: "Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the Church and her Courts to the Sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce a mensa et thoro, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour

(1) 4 P. D. 1, 4.

to solve, what has been found so often very difficult of solution, the question of a person's domicil. If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary, pro salute animae." In like manner Cotton L.J., referring to the jurisdiction of the Ecclesiastical Courts, says (1): "Moreover, the Diocesan Courts, whose jurisdiction is vested in the Court of Divorce, looked to the residence not to the domicil of the respondent for the purpose of deciding whether a suit could be entertained; and I see no reason for supposing that an Ecclesiastical Court, acting pro salute animae, would have declined to interfere against an offending husband or wife in respect of an act committed within the local limits of its jurisdiction, because the parties though resident within those limits were domiciled elsewhere. There is, in my opinion, no sufficient reason for limiting the right and liability to sue and be sued in the Court of Divorce to persons domiciled in England; and my opinion is, that under the circumstances of this case the Court of Divorce has jurisdiction to entertain a petition for judicial separation against the respondent." It is quite true that Brett L.J. differed on the question as to the jurisdiction of the Court to grant a divorce; but the statement as to the power of the Court to grant a decree for judicial separation remains unaffected. Subsequently the same point was considered afresh in *Armytage* v. *Armytage*.(2) In that case a wife petitioned for judicial separation on the ground of cruelty. The offences alleged were committed in Italy, and the husband's domicil was in Australia, but both parties came to England, and the wife, being apprehensive that the acts of cruelty would be repeated in England, commenced a suit for judicial separation. The whole case proceeded on the footing that if the matrimonial offence had been committed within the jurisdiction the Court would have had jurisdiction to deal with it. The husband alleged that no matrimonial offence had been committed within the jurisdiction, but it was held, notwithstanding that, that as the parties were then resident in England the Court had jurisdiction to entertain it. Gorell Barnes J. went very fully into the question as dealt with both by English and foreign writers on

(1) 4 P. D. 22. (2) [1898] P. 178.

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international law, and summed up the result as follows (1): "I conclude from the writers to whom I have referred that most of them are disposed to consider that the Courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party." Then, after referring to s. 22 of the Act of 1857, he said (2): "In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent's counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction."

The Court, therefore, being bound by the principles and rules on which the Ecclesiastical Courts acted, the question resolves itself into this: Would the Ecclesiastical Courts have entertained a suit for divorce a mensa et thoro, where the parties were resident here but domiciled abroad? The answer is obviously Yes. No single authority has been cited to suggest the contrary. There is a case of *Carden* v. *Carden* (3), in which, as appears from the judgment, what the Court was considering was the question of residence and not domicil, and it was held that it was residence within the diocese before the issue of the citation which gave the Court jurisdiction.

Then it is contended that the Court could not, having regard to the principles of the jus gentium, give effect to this rule in any questions which might involve altering the status of foreigners. The answer is that given by Gorell Barnes J. in *Armytage* v. *Armytage* (4), namely, that the Court is bound by the statute. Further, I do not consider it to be settled that a decree for judicial separation will affect the status of married parties. A doubt was expressed on that point by Gorell Barnes J. in *Armytage* v. *Armytage*. (5) So that, without considering whether it will or will not affect the status

(1) [1898] P. 192.
(2) Ibid. 194.
(3) (1837) 1 Curt. 558.
(4) [1898] P. 178.
(5) [1898] P. 178, 196.

of the parties, it is enough to say that the Court is bound by the Act of 1857 to deal with the case upon the same rules and principles as those upon which the Ecclesiastical Courts would have dealt with it before the passing of that Act. The decision of the learned judge in the Court below was therefore right, and the appeal must be dismissed.

WARRINGTON L.J. The question here is whether the Court has jurisdiction to grant a decree for judicial separation where the parties though resident in England are said to be domiciled abroad. In the present case the acts of cruelty complained of were as to most of them committed in this country. The exact point was decided in *Armytage* v. *Armytage* (1), and indeed the decision goes even further, for most of the acts of cruelty there alleged were not committed in this country. That case was decided in 1898, and is cited in all the text-books, and has never been questioned since it was decided. We are now asked to overrule it. It would require a very strong case to justify us in so doing. But, in my opinion, the decision in *Armytage* v. *Armytage* (1) was right. A decree for judicial separation takes the place of a divorce a mensa et thoro, and the jurisdiction exercised by the Court in pronouncing a decree for judicial separation is part of the jurisdiction transferred to the Divorce Court by ss. 6, 7, and 22 of the Matrimonial Causes Act, 1857. [His Lordship read the sections, and continued:] The question really is, what were the principles and rules on which the Ecclesiastical Courts exercised their jurisdiction before 1857? They are stated by James L.J. in *Niboyet* v. *Niboyet* (2) in the passage in his judgment which has been read by the Master of the Rolls. In *Le Mesurier* v. *Le Mesurier* (3) Lord Watson, referring to that case, said: "The main reason assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a mensa et thoro, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce

(1) [1898] P. 178. (2) 4 P. D. 4.
(3) [1895] A. C. 517, 531.

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Warrington L.J.

might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe sect. 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court."

No attempt is here made to controvert the statements made by James L.J. and Lord Watson as to the rule of the Ecclesiastical Courts, and those statements must be accepted as accurate statements of the law and practice. If that be so, then there is an end of the case, because it follows that the jurisdiction of the Court is the jurisdiction previously exercised by the Ecclesiastical Courts, and must follow the principles and rules on which those Courts acted. In my judgment the decision in *Armytage* v. *Armytage* (1) was right in principle, and the judgment of Horridge J. in the present case dismissing the act on petition was also right, and ought to be affirmed.

It is contended that the principle on which domicil, and domicil alone, is said to give jurisdiction is that in the case of a dissolution of marriage the status of the parties is affected, and that the same principle ought to be applied to petitions for judicial separation. I am not, however, prepared to accept the view that a decree for judicial separation does affect the status of the parties, but even if it does, the statute prevents us from taking into consideration questions of international law. In my opinion the appeal fails.

DUKE L.J. I agree. The Court is asked to settle the law in a sense contrary to the practice of the Divorce Division. It is suggested that a wife who is domiciled abroad cannot come to a Court in this country to obtain the relief which is sought in the present case. I should have deplored it, if I thought that must be found to be the law, but, in my opinion, the luminous judgment

(1) [1898] P. 178.

of James L.J., which has been referred to, has dispelled that view. I agree that there is no ground for interfering with the decision of Horridge J.

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Appeal dismissed.

Solicitors: *Mackrell, Maton, Godlee & Quincey; Reed & Reed.*

W. I. C.

DIVORCE.

1918 *May* 15.

BRIERLEY *v.* BRIERLEY AND WILLIAMS.

Divorce—Practice—Evidence—Birth of Child as Proof of Wife's Adultery—Entry in Register signed by Wife—Prima facie Evidence—Rebuttable—Corroboration—Births and Deaths Registration Acts, 1836 (6 *&* 7 *Will.* 4, *c.* 86) *and* 1874 (37 *&* 38 *Vict. c.* 88).

An entry in a register of births, deaths, and marriages is by statute prima facie, but not conclusive, evidence of all the facts required by statute to be entered therein. Therefore, when a husband has proved the impossibility of access to his wife for a certain period, an entry signed by the wife of the birth of a child during that period is prima facie evidence of the date as well as the fact of the birth, and, inferentially, of the wife's misconduct. The Court may, however, require corroboration.

In re Wintle (1870) L. R. 9 Eq. 373 dissented from.

In the Estate of Goodrich [1904] P. 138 followed.

THIS was a husband's petition for divorce on the ground of the wife's adultery.

The evidence of adultery was the birth of a child at a time when the husband, having been absent on military service in France, could not have been the father.

To prove this birth the petitioner produced, and proved by the evidence of the registration officer, a register of the birth signed by the wife, whose handwriting was proved, stating that the wife was the mother, and in which the father's name was left blank.

Mortimer, for the petition, stated that further evidence could be produced if necessary, but he preferred to rest his case on this register.

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[McCARDIE J. Does the register amount to more than a confession by the wife? Do not you need corroboration?]

I submit not; the entry in the register is made evidence by the Births and Deaths Registration Acts, 1836 and 1874. (1)

[On this point *J. H. Murphy*, amicus curiae, referred to *Collins* v. *Collins and Deal.* (2)]

Lord Romilly expressed an opinion in *In re Wintle* (3) that the Act made the register evidence of the fact of birth only, not of the date, but that decision was disapproved by Phillimore J. in *Wilton* v. *Phillips* (4) and by Jeune P. in *In the Estate of Goodrich* (5), and it is inconsistent with *Doe* v. *Barnes* (6) and *Reg.* v. *Weaver.* (7)

McCARDIE J. Mr. Brierley seeks a decree nisi for the dissolution of his marriage on the ground of the adultery of his wife. The evidence of that adultery relied on is that the wife gave information to the registrar of births of the birth of a child. She duly signed the entry in the register affirming the facts of which information has to be given, and her signature is proved. Non-access on the part of her husband is also clearly proved.

The matter for decision is as to the effect of the entry in the register as duly signed and verified. The register states that a child was born, and the date given is March 1, 1916. The name of the father is left in blank. As to the effect of the entry in the register or a certificate thereof, it is well to consider the statute 6 & 7 Will. 4, c. 86, s. 38, by which it is provided "That the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry . . . ."

By s. 18 of the same Act registers of births must be kept embodying the particulars required according to Sched. A, and the form in Sched. A includes a statement of the date of the birth.

(1) 6 & 7 Will. 4, c. 86; 37 & 38 Vict. c. 88.
(2) (1916) 115 L. T. 936.
(3) L. R. 9 Eq. 373.
(4) (1903) 19 Times L. R. 390.
(5) [1904] P. 138.
(6) (1834) 1 Moo. & R. 386.
(7) (1873) L. R. 2 C. C. 85.

Therefore the particulars given in Sched. A are the particulars required to comply with the Act. By s. 1 of 37 & 38 Vict. c. 88 it is the duty of a mother (inter alios) to give information to the registrar of the birth of a child, together with information of the particulars required to be registered concerning such birth, and she is bound, in the presence of the registrar, to sign the register.

By s. 39 of that Act this duty is enforced by the imposition of a penalty in case of default.

By s. 4 of the same Act every registrar is bound to inform himself carefully of every birth which happens within his district.

Sect. 38 of the Act provides that an entry or certificate thereof is not to be evidence unless the entry purports to be signed by the informant.

The effect of a certificate given under these Acts is considered in *Reg.* v. *Weaver* (1), in which case it was decided that public documents or duly certified copies thereof are admissible in evidence on mere production. This case appears to have impliedly decided, moreover, that a duly certified certificate of birth was prima facie evidence of the date as well as the fact of birth.

Lord Romilly in *In re Wintle* (2) expressed the view that an entry in the register or a certified copy thereof establishes the fact of a birth and nothing more. To so hold in my view impairs and restricts the utility of the statutes. Later before Phillimore J. in *Wilton* v. *Phillips* (3) the question arose whether a certified extract from the register is evidence of the date of birth. The case of *In re Wintle* (2) was cited, but, in spite of the decision of Lord Romilly in that case, Phillimore J. held that a certified extract is sufficient evidence of the date as well as the fact of birth. Phillimore J. stated that a certified copy is prima facie proof of all such matters as are required as particulars by the statutes. It does not appear that in that case *In the Estate of Goodrich* (4) was cited, in which Jeune P. held that a certified copy made in pursuance of the Acts is evidence not merely of the fact of the birth, but also of its date.

In order to remove doubt with regard to the authorities and as to a point of practice, I think it well to state that in my opinion Lord Romilly's decision in *In re Wintle* (2) is not law, and

(1) L. R. 2 C. C. 85.
(2) L. R. 9 Eq. 373.
(3) 19 Times L. R. 390.
(4) [1904] P. 138.

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that the correct decisions on this point are those of Jeune P. and Phillimore J., which are in conformity with the Acts of Parliament and recognize the principles of law appropriate thereto. I desire to add that neither the register nor the certificate are in any way conclusive, but only prima facie, evidence of the facts to be established in a case such as the present. Evidence, however, can clearly be given to contradict them, and, in a proper case, corroboration of them may be required. But I see no reason to doubt that prima facie evidence may be furnished by the entry in the register or a certified copy. Here the entry in the register is verified by the signature of the wife herself.

There will be a decree nisi.

Solicitor for petitioner: *H. A. Sims, for Whitaker, Hibbert & Evans, Haslingden.*

J. R. B.

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May 15, 16.

DIVORCE.

MYERS *v.* MYERS, CARPENDALE, RADFORD AND THOM.

Divorce—Practice—Three Co-respondents—Separate Trials of Issues of Fact—Jurisdiction—Equal Rights of Petitioner and Respondents to apply for separate Trials—Rules of the Supreme Court as Guide where no special Divorce Rule exists—Rules of the Supreme Court, Order XXXVI. r. 7.

The Divorce Court has an inherent jurisdiction to order separate trials of different issues in a matrimonial suit in order to ensure that equal justice may be done between all parties. In the absence of any precise rule of practice in the Divorce Rules or statutes, the Court may be guided by the Rules of the Supreme Court, e.g., Order XXXVI., r. 7. The jurisdiction should be exercised sparingly and on the principle that so far as possible no disadvantage should be imposed on any particular party to the proceeding.

The right to apply for separate trial of an issue or issues belongs to all the parties to a suit indifferently, and not to co-respondents only.

ADJOURNED SUMMONS.

This was a husband's petition for divorce on the ground of his wife's adultery with three persons, Radford, Carpendale, and Thom,

all officers in the Army. The respondent and Carpendale had filed answers denying the adultery alleged against them. Neither of the other co-respondents had filed answers and Radford had died. The petition was filed in October, 1915. Carpendale filed his answer in March, 1916, and the respondent filed hers in May, 1917. The petition was set down for trial with a jury. A short postponement was consented to by the petitioner on the ground that Carpendale was absent from England. It was now stated that he was on active service in Mesopotamia and his probable absence was of indefinite duration.

The petitioner objected to further delay and took out this summons for an order that the issues of fact against the respondent and co-respondents, other than Carpendale, might be tried separately from that against him; the summons had been adjourned into Court.

The adultery was charged as having occurred in 1914 and 1915. There was one infant child of the marriage, of whom the wife had custody pendente lite. She also was in receipt of 10*l.* a week alimony. There were marriage settlements of considerable amount.

Bayford, for the petitioner. There is undoubtedly jurisdiction to order issues of fact to be tried separately: *Stone* v. *Stone* (1); *Cox* v. *Cox, Reade and Tobin* (2); and in the present case the interests of justice require it. *Cox* v. *Cox, Reade and Tobin* (2) has been followed in numerous unreported cases, e.g., in *B.* v. *B., W. and P.* (3), *Miller* v. *Miller* (4) (reported only in *The Times* newspaper), and *Creighton* v. *Creighton, Campbell and Vane* (5), to which I can speak from my own recollection. It is true that those orders were made on the application of co-respondents, and I cannot give the Court any instance of such an order having been made on the application of a petitioner, but there is no reason in principle for any difference.

Le Bas, for the respondent. I do not dispute the jurisdiction in a proper case, but it should be exercised with great care so as to give no advantage to either party. In this case it would be a great disadvantage to the respondent, for she relies upon the evidence

(1) (1864) 3 Sw. & Tr. 608.
(2) (1871) L. R. 2 P. & M. 201.
(3) Unreported.
(4) (1907) *The Times*, March 9.
(5) Unreported.

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of Carpendale to assist her with a jury in dealing with letters which passed between her and the other co-respondents. There is no instance of such an order on the application of a petitioner, and there are no special circumstances to induce the Court to make the order in this case.

J. H. Murphy, for the co-respondent Carpendale, referred to *Blackett* v. *Blackett and Frail.* (1)

Bayford, in reply, referred to *Giles* v. *Giles.* (2)

McCARDIE J. This is a husband's petition for the dissolution of marriage by reason of his wife's adultery. The petitioner has issued a summons asking that the issues as to the wife's alleged adultery with Radford and Thom may be tried separately from and prior to the trial of issue as to her alleged adultery with Carpendale. As an important question of procedure appeared to be involved, I deemed it desirable that the summons should be adjourned into Court for argument. [His Lordship then stated the facts as above, and continued :] Under these circumstances I have to decide whether I shall accede to the request of the petitioner as indicated in the summons.

It is not disputed that the Court has jurisdiction to direct the separate trial of separate issues. The question could not arise prior to 1857, for the Ecclesiastical Courts possessed no power of dissolving marriages. The point arose, but indistinctly only, in *Stone* v. *Stone* (3), and that case affords me no real assistance. But in *Cox* v. *Cox, Reade and Tobin* (4) Lord Penzance directed, on the application of the co-respondent Tobin, that the issues against him should be tried prior to the trial of the issue against the co-respondent Reade, who had appeared but filed no answer. The concise judgment of Lord Penzance contains no statement of the principles which should guide the Court in directing separate trials of separate issues.

Orders substantially similar to that in *Cox* v. *Cox, Reade and Tobin* (4) were made by Barnes P. in *B.* v. *B., W. and P.* (5) on March 7, 1898, and in *Miller* v. *Miller* (6), and by Evans P. in *Creighton*

(1) [1902] P. 170.
(2) [1900] P. 17.
(3) 3 Sw. & Tr. 608.
(4) L. R. 2 P. & M. 201.
(5) Unreported.
(6) See *The Times*, March 9, 1907.

v. *Creighton, Campbell and Vane* (1) on March 13, 1917. In the last-named case (for a note of which I am indebted to Mr. Bayford) Evans P. directed that the trial of the issue as against the second co-respondent, Vane, should stand over until after the trial of the issue as against the first co-respondent, Campbell.

This jurisdiction of the Court must, I think, be inherent. It rests on the power and the duty of the Court to ensure that justice be done as between all parties. There is no statutory provision on the matter. I am satisfied that s. 40 of the Matrimonial Causes Act, 1857, is not relevant to the question, and that none of the Divorce Rules bear upon the point.

In the absence of any statutory enactment, and of any relevant divorce rule, I think that it is legitimate, when exercising the inherent jurisdiction, to remember the Rules of the Supreme Court as a useful though non-obligatory guide: see *Giles* v. *Giles* (2), per Barnes J.; *Bullus* v. *Bullus* (3), per Bigham P.; and *Dooley* v. *Dooley* (4), per Bargrave Deane J. Hence I call attention to Order XXXVI., r. 7, of the Rules of the Supreme Court, which provides (in substance) that the Court may at any time, or from time to time, order that one or more issues of fact be tried before the other or others. I agree that no such order should be made save in exceptional circumstances, and I respectfully adopt the observations upon the point by Jessel M.R. in *Piercy* v. *Young*. (5)

The power of the Divorce Court to direct the separate trial of issues must, I conceive, be exercised with great care, and the relevant considerations must be anxiously weighed. The jurisdiction should be sparingly exercised. The only principle which can guide the Court is that such order be made as best ensures that justice be done as between petitioner, respondent, and co-respondent alike. If an obvious disadvantage might result to the wife from an order that the issues with respect to several co-respondents be determined separately, then no such order should as a rule be made But cogent and exceptional facts may call for the separate trial of issues even in such a case—e.g., where grave hardship might result to the husband from the refusal of such an order. Where the

(1) Unreported.
(2) [1900] P. 17.
(3) (1910) 26 Times L. R. 330 102 L. T. 399.
(4) (1911) 28 Times L. R. 113.
(5) (1880) 15 Ch. D. 475, 479.

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wife can only allege that she will or may lose some tactical advantage by the separate trial of issues, then the Court should not attribute undue weight to the wife's objection.

It is clear, I conceive, that the wife cannot claim that she alone is to be considered. The husband's interests should be regarded equally with the interests of a wife or co-respondent. Full recognition should be given to the husband's position and rights as a petitioner. The Court must always weigh the matter with due regard to the interests of all parties.

It was pointed out by Mr. Le Bas that all the orders made in the past for the separate trial of separate issues as to adultery had been made at the instance of a co-respondent. I agree that this is so. But I can see no reason for limiting the right to make such an application to a co-respondent. I conceive that an equal right to apply must exist in the petitioner and in the respondent. In the present case there has already been serious delay for which the petitioner is in no way responsible. If the petitioner can establish the allegations of adultery as between his wife and Radford, deceased, or as between his wife and Thom, he will at once secure a decree nisi. So long as the whole case is pending he remains under an obligation to pay alimony at the rate of 10*l.* per week. He is desirous (if adultery is established) to secure at an early date a variation of the marriage settlements, and he will also wish to take the view of the Court as to the custody of the child.

Mr. Le Bas has contended on behalf of the wife that she would suffer a serious hardship if I grant the application of the husband. It seems that letters of an apparently compromising character passed between the wife and Radford and also between her and Thom and Carpendale. It is submitted by Mr. Le Bas that these letters can be explained by the wife, and that if she be supported in her explanation by Carpendale as to the letters between him and her it will strengthen her explanation of the letters which passed between her and Radford and Thom. But it is conceded that, apart from any such question of explanation, the cases in respect of the three alleged adulteries are quite separate and independent. In my view the advantage (if any) which might result to the wife by corroborative explanatory testimony on the part of Carpendale is wholly outweighed by the serious injury which may be inflicted

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on the husband if a further and indefinite postponement takes place of the issues with respect to the alleged adultery of the wife with Radford and Thom.

Mr. Murphy opposed the summons on behalf of Carpendale. But I am unable to see that this co-respondent will suffer in any way if I make the order asked for by the petitioner. The defence of Carpendale will not be impaired. The trial of the issues against him will take place separately at a later date.

Upon the whole, therefore, I have come to the conclusion that under the special circumstances of the case I should direct that the trial of the issues as to the alleged adultery with Radford and Thom should take place prior to the trial of the issue with respect to the adultery alleged with Carpendale. The trial of the latter issue will stand postponed till further order.

Solicitors for petitioner: *Gush, Phillips, Walters & Williams.*
Solicitors for respondent: *Ford, Lloyd & Co.*
Solicitors for co-respondent Carpendale: *Charles Russell & Co.*

J. R. B.

[IN THE COURT OF APPEAL.]

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March 15, 18; *May* 15.

WICKINS *v.* WICKINS (A. E. GOODE, PARTY CITED).

Divorce—Desertion by Husband—Non-compliance with Decree for Restitution of Conjugal Rights—Wife's Petition for Divorce—Failure of Husband to put in Answer denying Adultery—Subsequent Cross-petition by Husband for Divorce—Dismissal of Wife's Petition—Conduct of Husband—"Without reasonable cause"—"Without reasonable excuse"—Allowing Petition to remain undefended—Discretion of Court to grant Husband Decree—Refusal of Court to lay down Rule for Exercise of Discretion—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Matrimonial Causes Act*, 1884 (47 *&* 48 *Vict. c.* 68), *s.* 5.

No general rule can be laid down for the exercise by the judge of the Divorce Division of the discretion vested in him by s. 31 of the Matrimonial Causes Act, 1857.

The Court of Appeal is not entitled to, and in any case ought not to, lay down a rule that in exercising the discretion under s. 31

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the only facts and matters to which the judge may have regard are those bearing upon, or directly connected with, the matrimonial offence of which the party seeking dissolution of marriage may have been guilty. The discretion permitted by s. 1 should be left as free as the Legislature has left it. The section does not prescribe or define limits within which alone it may be exercised, and, having regard to the very varying circumstances of different cases, it would be very inexpedient for the Court of Appeal to attempt to do so.

There is no distinction in meaning between the expressions "without reasonable cause" in s. 5 of the Matrimonial Causes Act, 1884, and "without reasonable excuse" in s. 31 of the Act of 1857.

A wife obtained a decree for restitution of conjugal rights. The husband not having complied with the decree, the wife presented a petition for dissolution of marriage on the ground of his adultery and desertion. The husband did not appear and the petition was set down as undefended. He subsequently obtained leave to file an answer, and put in an answer denying his adultery and alleging that the petitioner had herself committed adultery and asking the Court to reject the prayer of the petition and to decree that his marriage might be dissolved. At the hearing the wife's adultery was proved and her petition was dismissed. The judge found as a fact that the husband had separated from his wife without any justification for doing so. He commented adversely on the conduct of the husband in allowing the petition in the first instance to remain unanswered although he was charged with adultery. The husband gave evidence denying the adultery, and there was no evidence that such adultery had been committed. Having regard to all the facts and circumstances of the case, the judge declined to exercise in favour of the husband the discretion vested in him under s. 31 of the Act of 1857, and he dismissed the husband's cross-petition. On an appeal by the husband:—

Held, that the Court of Appeal would not interfere with the discretion exercised by the judge.

APPEAL by the husband, Bertram V. W. Wickins, from the judgment of Horridge J. at the trial dismissing his cross-petition for dissolution of his marriage with Mabel Wickins.

The following statement of facts is taken from the considered judgment of the Court (Swinfen Eady M.R. (1), Bankes L.J., and Eve J.), which was delivered by Swinfen Eady M.R.:—

"The parties were married on May 23, 1896. There are two

(1) In the interval between the hearing of the appeal and the delivery of judgment Swinfen Eady L.J. had been appointed Master of the Rolls.

children of the marriage, a boy born on June 17, 1901, and a girl born on September 2, 1905. On December 20, 1915, the wife presented a petition for restitution of conjugal rights, and obtained a decree on April 3, 1916. This was served on April 11. On June 13, 1916, the wife obtained an order for periodical payments of 4*l.* a week, and these payments were duly made. On February 5, 1917, the wife presented a petition for dissolution of the marriage on the ground of the adultery and desertion of her husband, the adultery alleged being with one Agnes Palmer. On March 15, 1917, the husband not having appeared, the petition was set down as undefended. Subsequently the husband obtained leave to file an answer, and on May 3, 1917, he put in his answer denying his adultery and alleging that the petitioner had herself committed adultery with one Archibald Ernest Goode, and asking the Court to reject the prayer of the petition and to decree that his marriage might be dissolved, and that he might have the custody of the two children of the marriage.

"Particulars of the petitioner's alleged adultery were duly given, and upon the petition coming on for hearing counsel for the petitioner stated that he was not in a position to deny the adultery alleged against her. The petitioner's adultery was proved, and the judge dismissed her petition.

"The husband then applied on his cross-petition for a decree dissolving his marriage, notwithstanding the decree of restitution and non-compliance. The judge found as a fact that the husband separated from his wife in October, 1915, without any justification whatever for doing so, and that such view was confirmed by the Court granting a decree for restitution on April 3, 1916. It was at one time suggested during the trial that the husband separated from his wife in October, 1915, in consequence of suspicions of his wife's conduct, confirmed by a letter addressed to her, which was found and shown to him, but it subsequently transpired that there was a misapprehension on this point, as the husband stated that the letter did not come to his knowledge until after he had been served with the decree for restitution. The judge commented adversely on the conduct of the husband and expressed his strong disapproval of it. He stated that the husband allowed the petition in the first instance to remain as undefended, although he was charged with

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adultery with Miss Palmer; that he decided not to enter an appearance, although denying the charge in order that his marriage might be dissolved. Both the husband and Miss Palmer gave evidence denying the adultery charged, and there was no evidence of such adultery having been committed.

"Having regard to all the facts and circumstances of the case, the judge declined to exercise in favour of the husband the discretion vested in him under s. 31 of the Matrimonial Causes Act, 1857, and he dismissed the husband's cross-petition."

The husband appealed. The appeal was heard on March 15, 18, 1918.

J. B. Matthews, K.C., and *R. F. Bayford*, for the appellant. Horridge J. in dismissing the husband's cross-petition wrongly exercised his discretion under s. 31 of the Matrimonial Causes Act, 1857. In exercising that jurisdiction the judge can have regard only to the conduct of the petitioner mentioned in the proviso to that section. He ought not to have regarded in this case the fact that the husband did not defend the wife's petition. His discretion was not absolute, but judicial, and he ought only to have regarded the fact of desertion.

[BANKES L.J. Having found desertion, had he not the right to refuse the decree?]

He was not entitled to have regard to anything else. When the Court is satisfied that the desertion has not conduced to the adultery of the other spouse it may exercise its discretion in respect of the subsequent adultery in spite of the desertion: *Stone* v. *Stone* (1); see also *Brooke* v. *Brooke* (2); *Bigwood* v. *Bigwood*. (3) The conduct of the husband in the present case did not conduce to the wife's adultery, and he is therefore entitled to a decree: *Pearman* v. *Pearman* (4); *Ousey* v. *Ousey* (5); *Edwards* v. *Edwards* (6); *Pryor* v. *Pryor* (7); *Squire* v. *Squire* (8); *Mulley* v. *Mulley*. (9)

[SWINFEN EADY L.J. Is there any reported case in which the

(1) [1917] P. 125.
(2) [1912] P. 136.
(3) (1888) 13 P. D. 89.
(4) (1860) 1 Sw. & Tr. 601.
(5) (1874) L. R. 3 P. & M. 223.
(6) [1894] P. 33.
(7) [1900] P. 157.
(8) [1905] P. 4.
(9) (1909) 53 Sol. J. 469.

Court has overruled the exercise of the discretion of the judge and made the order which he ought to have made ?]

The nearest case is *Constantinidi* v. *Constantinidi*. (1) In that case a question arose as to the exercise of the discretionary jurisdiction conferred on the Court of varying settlements after a dissolution of marriage, and Cozens-Hardy L.J. said : " I decline to exercise my judicial discretion in favour of a petitioner whose conduct has been such as I have described. . . . . In my view, the order ought to be as reported by the registrar, and the order of the learned President ought to be set aside."

[SWINFEN EADY L.J. The discretion there did not arise under this particular s. 31.]

The discretion conferred on the judge in the Court below is not an arbitrary, but a judicial, discretion, and it is submitted that he has not exercised his discretion judicially.

[BANKES L.J. referred to *The Amstel*. (2)]

The discretion was subject to appeal under s. 56 of the Matrimonial Causes Act, 1857, which is now repealed by s. 2 of the Matrimonial Causes Act, 1868 (31 & 32 Vict. c. 77). There is now an appeal under s. 19 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

Taking all the facts into consideration, it is submitted that the discretion ought to be exercised in favour of the husband. [They also referred to *Robertson* v. *Robertson* (3) ; Matrimonial Causes Act, 1857, ss. 16, 27 ; Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5.]

Grazebrook, for the respondent. The additional charge of adultery was made after the pleadings were closed. Having said that the wife would not proceed upon her petition, it was not open to her counsel to take any part in the proceedings. But if a decree were granted to the husband upon the prayer in his answer, the wife would apply for an allowance and would have a right to be heard as to that. Unreasonable delay in commencing proceedings may be taken into account by the Court in exercising its discretion : *Pears* v. *Pears*. (4)

H. Lewis, for A. E. Goode, the party cited.

(1) [1905] P. 253, 285.
(2) (1877) 2 P. D. 186.
(3) (1881) 6 P. D. 119.
(4) (1912) 107 L. T. 505.

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[*Bayford* objected to counsel for the party cited being heard on the ground that the matter was one which concerned only the husband and wife. The Court allowed the objection.]

Bayford replied.

Cur. adv. vult.

May 15. SWINFEN EADY M.R. read the following judgment of the COURT (Swinfen Eady M.R., Bankes L.J., and Eve J.):—

The judgment in this case has been postponed until after the hearing of the appeal in *Holland* v. *Holland* (1), which, we were told, raised a similar point.

This is the appeal of the husband from the refusal of the judge at the trial to decree dissolution of the marriage. [His Lordship stated the facts as above set out, and continued:]

The husband on this appeal contends that the judge should have exercised in his favour the discretion vested in the Court under s. 31, and should have pronounced a decree declaring his marriage to be dissolved. It is conceded that the Court was not bound to pronounce such decree as the appellant was guilty of having deserted or wilfully separated himself from his wife before the adultery complained of and without reasonable cause, the decree for restitution of conjugal rights not having been complied with (Matrimonial Causes Act, 1884, s. 5).

We are of opinion that no distinction can be drawn between the expressions "without reasonable cause" in s. 5 of the Act of 1884 and "without reasonable excuse" in s. 31 of the Act of 1857, and that, as the appellant was deemed to have been guilty of desertion "without reasonable cause," he was guilty of having deserted his wife before the adultery complained of, and "without reasonable excuse," within the meaning of s. 31. The appellant contends that the judge at the trial improperly had regard to the appellant's conduct during the progress of the suit in not putting in any answer, in the first instance, to the wife's petition charging him with adultery with Agnes Palmer; the appellant alleged that he had not any evidence to prove his wife's adultery, although he suspected her of it, but it seems a curious mode of reasoning to say that, because he could not prove his wife's adultery, therefore he had

(1) Post, p. 273.

better not put in any answer denying the adultery alleged against himself.

The appellant asks the Court to lay down a rule that, in exercising its discretion under s. 31, the only facts and matters to which the Court may have regard are those bearing upon, or directly connected with, the matrimonial offence of which the party may have been guilty. We are of opinion that this Court is not entitled to lay down any such rule, and, in any case, ought not to do so. The discretion permitted by s. 31 should be left as free as the Legislature has left it. The section does not prescribe or define limits within which alone it may be exercised, and, having regard to the very varying circumstances of different cases, it would be very inexpedient for this Court to attempt to do so. No authority has been adduced by the appellant to show that, under the circumstances of the present case, the judge was judicially bound to give the husband a decree. In *Haswell* v. *Haswell* (1) the adultery of the wife was proved and also that the husband had separated himself from her before the adultery complained of, but, as upon the facts of the case the Court held that he had not " wilfully separated himself without reasonable excuse," it was held that the discretion never arose, and that the petitioner was entitled to a decree. Again, in *Ousey* v. *Ousey* (2) the husband who had deserted his wife had done so in the bona fide belief that she had wronged him, and, as it was determined that there was " reasonable excuse " for his conduct, the discretion under s. 31 did not really arise. It is true that in several of the reported cases where the Court has exercised its discretion in favour of the guilty party there has been some connection between the facts on which such discretion has been exercised and the matrimonial offence of which he has been guilty, and thus the Court has been led to take a lenient view of the matrimonial offence. For instance, in *Pearman* v. *Pearman* (3) a husband obtained a decree for dissolution by reason of his wife's adultery, although the jury found that he had been guilty of cruelty, as it appeared to the Court that the wife's drunken habits were the cause of the husband's cruelty. But it is not true that the only facts which the Court can take into consideration are facts and

(1) (1859) 1 Sw. & Tr. 502. (2) L. R. 3 P. & M. 223.
(3) 1 Sw. & Tr. 601.

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circumstances in connection with the matrimonial offence of which the party seeking dissolution may have been guilty, and the discretion conferred by s. 31 ought not to be so circumscribed.

From time to time the Court has referred to particular circumstances as justifying it in exercising its discretion in favour of granting a decree in cases where, having regard to s. 31, the Court was not bound to pronounce such decree. In *Morgan* v. *Morgan* (1) Lord Penzance referred to three classes of cases where the Court might exercise its discretion in favour of the petitioner under s. 31 : First, where one party had been led to believe that the other party was dead and, acting on that belief, married again ; secondly, where a wife had been compelled by her husband to lead a life of prostitution ; thirdly, where an act of adultery of the husband has been condoned by the wife and in no way conduces to her subsequent misconduct. But it is not to be inferred from this reference to illustrative cases that in all such cases the Court must necessarily grant relief ; or that the discretion which may be exercised under s. 31 in favour of the guilty party is limited to such cases ; or that relief can only be granted if the features of the case are such that it can be brought into some defined class. The cases referred to by Lord Penzance are merely illustrations of matters to which the Court will have regard in coming to a judicial determination on the matter, and which will incline the Court to give relief to a party in whose favour the Court is not bound to pronounce a decree.

We agree with the view expressed by the President in *Brooke* v. *Brooke* (2) that where Parliament has invested the Court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the judge of the Divorce Division than the Legislature has thought fit to impose : see *In re Norman* (3), and the observations of the Court of Appeal as to the duty of the Court to abstain from defining exhaustively what are " special circumstances " when the Legislature authorizes

(1) (1869) L. R. 1 P. & M. 644, 646.

(2) [1912] P. 136, 144.

(3) (1886) 16 Q. B. D. 673.

the Court to make an order " under special circumstances " or if the " special circumstances " of the case shall appear to require the same.

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In our opinion the appeal of the husband fails, and should be dismissed.

Appeal dismissed.

Solicitors: *W. R. Millar & Sons; Barnes & Butler; C. W. L. Brewer.*

W. I. C.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

P. D. 1917 *Oct.* 27; *Nov.* 1.

C. A. 1918 *May* 6, 7, 15.

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Divorce—Wife's Petition—Decree Nisi—Intervention of King's Proctor—Concealment of Wife's Adultery—Discretion of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The discretion given to the Divorce Division by s. 31 of the Matrimonial Causes Act, 1857, is uncontrolled. It is neither possible nor desirable to lay down any strict rule for its exercise beyond that stated by Evans P. in *Brooke* v. *Brooke* [1912] P. 205, n., that the discretion must be exercised " cautiously and carefully, and as far as possible consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality."

So *held* by the Court of Appeal, affirming the decision of Hill J.

IN this case the wife petitioned for a divorce and on June 8, 1916, obtained a decree nisi. The King's Proctor intervened to show cause why the decree nisi should not be made absolute on the ground that material facts had not been brought to the knowledge of the Court and that the petitioner had been guilty of adultery. He alleged that she had committed adultery with one James Orgee and had, on the day on which the decree nisi was obtained, given birth to a child of which James Orgee was the father. The petitioner admitted these allegations, but alleged (1.) that the respondent's misconduct and neglect had conduced to her adultery; (2.) that since June 8, 1916, she had not committed adultery; (3.) that except the adultery

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with James Orgee she had not misconducted herself, and that James Orgee was ready to marry her.

The following further facts were found by the judge:—The petitioner was married to the respondent in 1900; she was then eighteen years of age; at the time of the marriage she was pregnant by the respondent. There were altogether four children of the marriage. The marriage was not a happy one, and for a considerable part of the time prior to 1911 the respondent failed to support his wife and children, and they lived either with the respondent's parents or with the petitioner's mother and stepfather, a farmer named Samuel Orgee. In 1911 the petitioner was living with one child at her mother's and the respondent was living with the other children at his mother's. In that year the respondent finally deserted the petitioner and made no provision for her. The respondent, on whose adultery the decree nisi was based, lived with another woman from February, 1915. From 1911 to the date of the decree nisi the petitioner continued to live with the one child at the house of her mother and stepfather, working on the farm and living as one of the family. Two sons of the stepfather by a former marriage, of whom James Orgee was one, lived in the family. From some time in September, 1915, to the date of the decree nisi there were guilty relations between the petitioner and James Orgee, and a child was born on June 8, 1916. Since that date those relations had ceased. At the hearing of the petition the petitioner said nothing about her relations with James Orgee.

The case was heard before Hill J. on October 27, 1917.

Hollis Walker, K.C., and *Talbot-Ponsonby*, for the King's Proctor.
T. Cox Meech, for the petitioner.

Cur. adv. vult.

1917. Nov. 1. HILL J., after stating the facts of the case as above, proceeded: Those are all the material facts that I have to consider as to the concealment from the Court at the hearing of the petition, and I have to consider what should be done if that difficulty be surmounted.

The first point is that undoubtedly material facts were not brought to the attention of the Court and they ought to have been, but in

this case I am prepared to find that there was no wilful intention to mislead the Court, and that the petitioner on the hearing acted in ignorance. I do not say that in all cases those facts should be an excuse—far from it; but in the particular circumstances of this case I do not think I ought to refuse to excuse the petitioner on the sole ground of concealment and that she did not bring the facts to the attention of the Court.

It still remains for me to consider whether, if the Court had known all the facts at the hearing of the petition, as it now knows them, relief ought to have been granted to the petitioner. Knowing all the facts, ought I to permit the decree to be made absolute? Now I do not doubt that in this matter the Court has, under s. 31, an unfettered discretion, and that it is neither desirable nor possible to lay down definite and rigid rules by which it should be guided in all cases. To do so would be to destroy a discretion the exercise of which must depend upon the particular facts of each case. At the same time that discretion must not be exercised in a haphazard fashion, but, as Sir Samuel Evans said in *Brooke* v. *Brooke* (1), "cautiously and carefully, and, as far as possible, consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality." If the reported cases are considered, it is obvious that there has been a gradual change in the views which judges have taken of the way in which they should exercise this discretion, the change being in the direction of greater leniency, especially where the wife is the petitioner. But where the greatest leniency has been exercised I think I am right in saying that the circumstances have still been exceptional and peculiar. I can in the present case find no exceptional circumstances, unless the mere fact that the husband has deserted the wife and ceased to provide for her is to be so regarded, and I do not think it is. Here the wife was deserted and the respondent ceased to provide for her, and afterwards went to live with another woman, but the petitioner was not thereby in any sense driven to adultery. She had a home at her stepfather's. It was not any necessity, but her own choice or weakness, which at the age of thirty-three led her to commit adultery with James Orgee and to continue it up to the date of the decree nisi. I am fully aware of the ill consequences in this particular

(1) [1912] P. 205, n.

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case of leaving the petitioner bound to the respondent. She cannot marry the other man, and the child by the other man is left without a father. But if hard cases make bad law I am sure they make worse morality, and these considerations to which I have referred in this particular case are far outweighed by the general consideration that in the interests of morality only exceptional circumstances can excuse a husband or wife who, being wronged himself or herself commits adultery. I can find nothing in the circumstances of this case which should lead me to exercise my discretion in the petitioner's favour. There will therefore be judgment for the King's Proctor.

T. Cox Meech applied under Order XVI., r. 31c (Poor Persons), for leave to appeal.

HILL J. I have no objection. It is always a difficult matter to say how the discretion should be exercised. I should be very glad if some general principles were laid down for guidance.

J. R. B.

The petitioner accordingly appealed. The appeal was heard before the Court of Appeal (Swinfen Eady M.R., Bankes L.J., and Eve J.) on May 6, 7, 1918.

T. Cox Meech and *D. Carswell*, for the appellant. It is submitted that this is a case for the exercise of the discretion under s. 31 in favour of the appellant, especially as she alleges that the respondent's conduct conduced to her misconduct, and that James Orgee is willing to marry her if the decree nisi is made absolute. It is submitted that the Court of Appeal should lay down some general rule for the guidance of judges of the Divorce Division in the exercise of their discretion. In *Gayer* v. *Gayer* (1) Lord Cozens-Hardy M.R. said: "I think that it is our duty to help the learned judge, but I disclaim any right to interfere with his discretion." In that case the judge in the Court below had invited the Court of Appeal to give him some guidance. There is only one reported decision of the Court of Appeal as to the exercise of the discretion under s. 31, and that is a case in which the husband was petitioner: *Todd* v. *Todd*. (2) In the

(1) [1917] P. 64, 69.

(2) (1906) 23 Times L. R. 9; (1907) 24 Times L. R. 28.

reported cases in the Court of first instance there is a difference made between the case of a guilty wife and that of a guilty husband. It is highly desirable that there should be a uniform and consistent practice for the exercise of this discretion: *Powell* v. *Powell.* (1)

[SWINFEN EADY M.R. What general principles can be laid down which would not fetter the Court in the exercise of its discretion? The statute leaves it open.]

The earlier decisions have limited the discretion in one way, and later decisions have extended it in the other direction. In the earlier cases the principles of the Ecclesiastical Courts were followed: Report of Royal Commission on Divorce and Matrimonial Causes, 1912, s. 368, p. 121. In *Morgan* v. *Morgan* (2) Lord Penzance, after stating three classes of cases in which the discretion might fitly be exercised in favour of a petitioner, said: "I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules. . . . . Past experience has already pointed out some classes of cases in which it is fitly applied; and the future may probably furnish more." He there contemplated that other rules would be laid down for the guidance of the Court in the exercise of the discretion. In *Symons* v. *Symons* (3) Jeune P. lays down the principle that the circumstances to be considered by the Court in exercising its discretion under s. 31 to grant a divorce to a wife who has been guilty of adultery include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct, and the learned President quoted s. 6 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), as declaratory of the law: see *Constantinidi* v. *Constantinidi.* (4)

The present is a clear case in which the husband, if he had been the petitioner, would not have been granted a divorce. He wilfully deserted his wife, and his conduct has conduced to her adultery. He actually seduced his wife when she was only about eighteen years of age, and was therefore under a greater duty to give her the

(1) (1874) L. R. 3 P. & M. 186. 646, 647.
(2) (1869) L. R. 1 P. & M. 644, (3) [1897] P. 167, 176.
(4) [1905] P. 253, 271.

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protection of his home and society. Where the conduct of the respondent is such that he would have been refused a decree even if himself guiltless of adultery, such conduct is a defence against the King's Proctor in cases where it is not only in the interest of the parties but also in the interest of the children and the State that a divorce should be granted.

[SWINFEN EADY M.R. The only effect of any rule we might lay down would be to impose greater restrictions on the exercise of the discretion. The later decisions have laid down that the discretion of the judge should be unfettered.]

The only reported case completely against the appellant is *Wyke* v. *Wyke*. (1) *Tulk* v. *Tulk* (2) is also against the appellant; but in that case there was no question of the interest of the child or of remarrying. The man with whom the adultery was committed was dead. In *Shaw* v. *Shaw* (3) there was no question of remarrying. The wife and the man had parted, and she was living with the man before her cause of action against her husband arose. In the present case the appellant had a complete cause of action before her adultery. The effect of these cases is to show that to enable the Court to exercise its discretion in favour of a wife who is petitioning for a divorce, and who has herself committed adultery, she must prove that her adultery was the reasonable and necessary consequence of her husband's conduct. These decisions are contrary to the decisions before and after them. In *Ostick* v. *Ostick* (4) the woman at the time of the adultery was in constant communication with the respondent and was asking him to send her money. *Pretty* v. *Pretty* (5) is a strong case in the appellant's favour. There the man was willing to marry the petitioner, and the same was the case in *Brooke* v. *Brooke*. (6) In *Cleland* v. *Cleland* (7) the woman was not in want and was not driven to commit adultery, yet the discretion was exercised in her favour; so, too, in *Hale* v. *Hale* (8), where a man was willing to marry the woman.

Further, a party marrying a young person whom he had previously seduced is bound to exercise more than ordinary marital care over

(1) [1904] P. 149.
(2) (1906) 23 Times L. R. 120.
(3) (1904) 20 Times L. R. 795.
(4) (1916) 33 Times L. R. 28.
(5) [1911] P. 83.
(6) [1912] P. 205, n.
(7) (1913) 30 Times L. R. 169.
(8) (1915) 32 Times L. R. 53.

her conduct and deportment: *Dillon* v. *Dillon* (1); *Baylis* v. *Baylis* (2); *Hawkins* v. *Hawkins*. (3)

As to hardship, the learned judge in the Court below said: "She cannot marry the other man, and the child by the other man is left without a father." In the reported cases these have been the main considerations on which the discretion has been exercised.

[SWINFEN EADY M.R. *Brooke* v. *Brooke* (4) is very much against the Court laying down any such limitations as you suggest.]

In that case the woman had a comfortable home with her parents, and yet the discretion was exercised in her favour.

[SWINFEN EADY M.R. Your argument leads to this, that in every case desertion is conduct conducing to adultery.]

Approximately, but that in such cases a divorce should be granted where such discretion is in the interest of the parties, the children, and the State.

[BANKES L.J. How are you going to lay down a rule what is in the public interest?]

It is in the public interest that people should found respectable homes. Sect. 31 is not framed rigidly to apply to all cases where the wife has committed adultery. It was intended to debar persons leading dissolute lives and likely to contaminate any new union and to be construed in favour of a case where a new life may be opened to a deserted woman and an innocent child.

[BANKES L.J. If the parents marry the child will still be illegitimate.]

But the child will have the protection of the father and mother in their own home. In Scotland for many years adultery has not been a bar to divorce, and the evidence of high authorities before the recent Divorce Commission was to the effect that this rule has not led to any abuse. There was no statutory alteration. The old common law of Scotland has changed in deference to feelings of public expediency. No statutory change is necessary to meet such a case as that under consideration. The common law and equity of England should be adjusted to the needs of the time, and in that sense s. 31 should be interpreted as it was intended to be interpreted. The Legislature contemplated that the granting of a decree would

(1) (1842) 3 Curt. 86, 96.
(2) (1867) 1 P. & M. 395, 397.
(3) (1885) 10 P. D. 177.
(4) [1912] P. 205, n.

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be the rule and the refusal of it the exception. The operation of the section has been unduly restricted by the decisions, and it is submitted that the Court ought to restore its full operation : *Barnes* v. *Barnes* (1) ; *Morgan* v. *Morgan*. (2) The general trend of more recent judicial opinion seems to support the following propositions, namely : (1.) The discretion under s. 31 is judicial in the sense that it must be exercised consistently and according to recognized and appropriate principles of justice. (2.) It is an unfettered discretion in the sense that, subject to such principles, each case must be dealt with on its merits. (3.) The recognized and appropriate principles are : (i.) The Court will always consider the interest of society and public morals : *Schofield* v. *Schofield* (3) ; (ii.) the Court will closely scrutinize the past conduct of the parties with a view to apportioning the responsibility for existing circumstances, and will not permit a wrong-doer to profit by his wrong-doing ; (iii.) the Court will consider future as well as present circumstances and will give due weight to the effect of its decision on the moral welfare of either party.

Hollis Walker, K.C., and *Talbot-Ponsonby*, for the King's Proctor, were not called upon.

Cur. adv. vult.

1918. May 15. The judgment of the COURT was delivered by

SWINFEN EADY M.R., who, after stating the facts, continued : The learned judge considered the circumstances of the case, and did not see his way to exercise his discretion in favour of granting a decree to the petitioner. The question for consideration by this Court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the judge below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgment is erroneous.

We concur in the view expressed by the judge as to the true construction and effect of s. 31 of the Matrimonial Causes Act, 1857. Under that section the Court has an unfettered discretion, and it is neither desirable nor possible to lay down definite and rigid rules by which the Court should be guided in all cases.

(1) (1868) L. R. 1 P. & M. 572. (2) L. R. 1 P. & M. 644, 647.
(3) [1915] P. 207.

The judge most properly considered the facts to which he referred in his judgment. There was the non-disclosure to the Court of the petitioner's adultery, although she was on the point of being delivered of an illegitimate child. The petitioner was thirty-three years of age: she was living with her mother and stepfather in what was regarded as her home, and she was not driven into adultery by any want; the adultery continued from about September to the following June, although it had not been renewed since the decree nisi. On the other hand, the judge had before him the fact that the petitioner had been deserted for several years by her husband, and her statement that James Orgee was ready to marry her, if she became free.

But, taking all the circumstances into account, it is impossible to say that the judgment is erroneous, or that the judge was judicially bound to exercise his discretion in favour of the petitioner, or that in the judgment he fell into any error of law.

He states that in the exercise of his discretion he endeavoured to follow the rule to act "cautiously and carefully, and, as far as possible, consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality": *Brooke* v. *Brooke*. (1) No better rule can be laid down.

The appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *T. H. Horwood & Co.; The King's Proctor.*

(1) [1912] P. 205, n.

W. I. C.

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June 3, 7.
C. A.
July 8.

[IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

WICKINS *v.* WICKINS (No. 2).

Husband and Wife—Restitution of Conjugal Rights—Non-Compliance with Decree—Periodical Payments—Adultery of Wife—Power of Court to suspend Payments—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *ss.* 2, 4.

By s. 4 of the Matrimonial Causes Act, 1884, "The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just":—

Held, that the section gave the Court an unfettered discretion to suspend or vary periodical payments on any sufficient grounds.

A wife, who had obtained a decree for restitution of conjugal rights and an order for periodical payments, subsequently committed adultery. On an application by the husband McCardie J. made an order suspending the payments:—

Held, that the judge in making the order had rightly exercised his discretion, but that the order was not a final order by reason of which the wife could never obtain an allowance for maintenance, and that it would not preclude her, at a subsequent date, upon showing on facts that she was deserving of an allowance, from applying for a renewal of the periodical payments.

Decision of McCardie J. affirmed.

On December 22, 1915, Mrs. Wickins filed a petition for restitution of conjugal rights against her husband. On April 3, 1916, a decree for restitution was pronounced, which the husband disobeyed. On June 13, 1916, an order was made on the application of the wife under s. 2 of the Matrimonial Causes Act, 1884, for periodical payments to her by her husband at the rate of 208*l.* per annum. These payments had been regularly made. On February 6, 1917, the wife filed her petition for a divorce on the ground of her husband's adultery and statutory desertion. The suit was set down as undefended, but on May 9, 1917, the husband, by leave of the Court, filed an answer denying his adultery, and alleging acts of adultery by his wife in March, April, and May, 1917. The suit came on for hearing before Horridge J. on November 14, 1917, when the wife

offered no evidence and her petition was dismissed. The husband proved his allegations against his wife, but Horridge J., in the exercise of his discretion under s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), declined to grant relief to the husband, who had been guilty of desertion without reasonable cause. This decision was affirmed on appeal. (1)

In the meantime, on November 22, 1917, the husband filed a petition asking that the order for periodical payments to his wife might be suspended. This application was referred to the registrar, who reported that there was no direct authority, but in his opinion the order asked for ought to be made, as the wife had committed adultery. The husband now moved for confirmation of the registrar's report.

Sect. 4 of the Matrimonial Causes Act, 1884, is as follows: "The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just."

Bayford for the motion. Sect. 22 of the Matrimonial Causes Act, 1857, provides that in all suits, other than proceedings for the dissolution of any marriage, the Divorce Court shall proceed on the principles and rules on which the Ecclesiastical Courts had theretofore acted; and s. 17 gives power to the Divorce Court to grant alimony to a wife who is suing for restitution of conjugal rights. But the Ecclesiastical Courts never gave alimony to an adulterous wife; and the common law Courts followed the practice of the Ecclesiastical Courts and established the general rule that a husband is not liable for the maintenance of a wife who has committed adultery: *Govier* v. *Hancock* (2); *Wilson* v. *Glossop*. (3) The same principle is recognized in the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6. The only alteration since the Act of 1857 is the Act of 1884, which gives the Court a power to grant periodical payments to a wife as a means of enforcing an order for

(1) Ante, p. 265.
(2) (1796) 6 T. R. 603.
(3) (1887) 19 Q. B. D. 379; (1888) 20 Q. B. D. 354.

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restitution of conjugal rights in substitution for attaching the husband. These payments must be subject to the general rules as to alimony and maintenance. The discretion given to the Court by s. 4 of the Matrimonial Causes Act, 1884, must extend to stopping them altogether if the wife commits adultery.

Grazebrook for the wife. In this case the wife was the aggrieved party. The husband had deserted her without reasonable cause, and the order for periodical payments was made under s. 2 of the Act of 1884. The wife's adultery was not committed till more than a year afterwards. If the husband had obtained the decree nisi, which the Court has refused to grant him, he would not have been relieved from these payments. It is not correct to say that the Court never grants alimony to a guilty wife. It has always had and exercised a discretion to do so : *Ashcroft* v. *Ashcroft* (1) ; *Lander* v. *Lander*. (2) At common law no doubt the husband is relieved from liability to maintain a wife who has been guilty of adultery. But the Court can only exercise the powers given to it by statute. Sect. 4 of the Act of 1884 only gives power to vary the amount of periodical payments or to suspend them temporarily, not to stop them altogether. The Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, sub-s. 2, uses similar words, but shows that they are only intended to meet the case of a change in the husband's ability to pay.

Bayford, in reply, referred to *Brooking-Phillips* v. *Brooking-Phillips*. (3)

Cur. adv. vult.

June 7. McCARDIE J. read the following judgment :—This application raises a question of grave importance under s. 4 of the Matrimonial Causes Act, 1884. [His Lordship stated the facts of the case as above and read the section in question, and proceeded :]

There is no authority upon the point before me. The learned registrar, in his report, expresses the view that, inasmuch as a husband is under no obligation to maintain an adulterous wife, an order which provides for periodical payments to be made to her by the husband should be set aside upon proof that she has committed adultery.

(1) [1902] P. 270. (2) [1891] P. 161.
(3) [1913] P. 80.

I conceive that s. 4 of the Act of 1884 was primarily directed to a change in the financial circumstances of either the husband or the wife; but it is to be observed that no indication is given in the section of any limitation upon the powers of the Court to vary an order. In my opinion such powers exist upon proof of facts other than those relating to the fortune or the income or the earnings of either party. It seems to me proper and beneficial to hold that the discretion of the Court is unfettered save by the rules of justice, propriety, and good sense. The discretion, however, is a judicial one. It must be exerted, not capriciously, but upon substantial reasons.

How, then, should the discretion be exercised where the adultery of the wife since the date of the order has been established?

It is well, I think, in framing an answer to this question to consider the position of a husband at common law when the adultery of his wife is proved. It is clear that by the common law the adultery of the wife discharges the husband from liability for her maintenance: see Bacon's Abridgment, Baron and Feme, 7th ed., vol. 1, p. 720. So gravely did the Courts regard the adultery of a wife that in *Govier* v. *Hancock* (1) a husband was held not liable for necessaries supplied to his adulterous wife, although he himself had not only committed adultery but had also turned his wife out of doors prior to the acts of adultery by her. In *Cooper* v. *Lloyd* (2) it was held that where a wife is living apart from her husband an act of adultery at once terminates any implied agency to bind the husband by a contract for necessaries. Apparently this cessation of agency takes place independently of any knowledge by the husband or the tradesman of such act: see *Atkyns* v. *Pearce* (3); Lush on Husband and Wife, 3rd ed., pp. 407-8. I conceive that the decision in *Norton* v. *Fazan* (4) rested on the doctrine of estoppel as applied to special facts. The judgment of the Divisional Court in *Swan and Edgar* v. *Mathieson* (5) may be usefully contrasted with that decision.

To the general rule of the common law two exceptions have been established: First, if the husband has condoned the wife's adultery and received her back to his abode, he will again become liable for

(1) 6 T. R. 603.
(2) (1859) 6 C. B. (N.S.) 519.
(3) (1857) 2 C. B. (N.S.) 763.
(4) (1798) 1 Bos. & P. 226.
(5) (1910) 27 Times L. R. 153.

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her maintenance: see *Robison* v. *Gosnold* (1); *Harris* v. *Morris*. (2) Secondly, if the husband has connived at the wife's adultery, he cannot rely on that adultery to relieve him from the obligation of her maintenance: see *Wilson* v. *Glossop*. (3) Such is the common law.

Upon turning to the Vagrancy Acts I find that the same effect has been given to the wife's adultery, for in *Rex* v. *Flintan* (4) it was held that a man could not be convicted under 5 Geo. 4, c. 83, s. 3, for refusing to maintain his wife if he proved the commission of adultery by her, even though he himself had committed the like fault. As it was put by Littledale J., "Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married."

So too with respect to the poor law. It has been held under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 33, that a husband cannot be ordered to maintain a wife with whom he has ceased to cohabit in consequence of her adultery: see *Culley* v. *Charman* (5) and *Mitchell* v. *Torrington Union*. (6) The opinions expressed in the last-named cases seem to be in full consonance with the view of the Legislature as to the resultant consequences of a wife's adultery, for on turning to the Summary Jurisdiction (Married Women) Act, 1895, I find that the magistrates are not only empowered, but are expressly required, to discharge a maintenance order upon proof that the wife has afterwards committed adultery. So strictly has this obligation of the magistrates been construed that in *Ruther* v. *Ruther* (7) it was held by Lord Alverstone C.J. and Wills and Channell JJ. that the magistrates were bound under s. 7 to discharge a maintenance order in spite of the fact that the husband's conduct had conduced to the wife's adultery.

I deem it my duty to apply s. 4 of the Matrimonial Causes Act of 1884 with a due regard to the existing common law, to the decisions given by the Courts under the Vagrancy and Poor Law Acts and the Summary Jurisdiction (Married Women) Act, 1895, to the ecclesiastical law, and to the interests of public morality. Consistency is a desirable feature of a well-framed system of jurisprudence.

(1) (1703) 6 Mod. 171.
(2) (1801) 4 Esp. 41.
(3) 19 Q. B. D. 379; 20 Q. B. D. 354.
(4) (1830) 1 B. & Ad. 227, 230.
(5) (1881) 7 Q. B. D. 89.
(6) (1897) 76 L. T. 724.
(7) [1903] 2 K. B. 270.

Just as adultery by a wife prior to a claim for restitution of conjugal rights will prevent a decree in her favour (see *Brooking-Phillips* v. *Brooking-Phillips* (1)), so adultery after such a decree should, I think, prevent her (save perhaps in exceptional circumstances) from claiming the benefit of any order made under s. 2 of the Act of 1884. Inasmuch as a decree under that Act does not dissolve the marriage relationship, it follows that it does not relieve the wife from the high duty of continued chastity. To hold otherwise would gravely and obviously impair the requirements of morality and the interests of social life.

In the present case no palliation whatever of the wife's conduct is suggested. She had secured an order for the periodical payment of a substantial sum. The husband punctually complied with the requirements of the order. Yet the wife committed adultery with E. Goode, not upon an isolated occasion only, nor under any unusual stress of facts, but habitually and almost openly and without the slightest mitigating circumstances. I must therefore direct the suspension of payments under the order of June 13, 1916.

The wife was allowed her costs and leave to appeal was given.

J. R. B.

From this order the wife appealed. The appeal was heard on July 8, 1918.

Grazebrook (*Schiller K.C.* with him) for the wife repeated the arguments used by him in the Court below.

Rigby Swift K.C. and *Bayford* for the husband were not called upon.

SWINFEN EADY M.R. This is an appeal of the wife in certain proceedings in the Divorce Division from an order of McCardie J. It is a case in which the wife obtained a decree for restitution of conjugal rights on April 3, 1916, which was served on April 11, 1916. Then on June 13, 1916, she obtained an order for periodical payments of 4*l.* a week, amounting to 208*l.* per annum, the first

(1) [1913] P. 80.

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payment to be made on June 23, 1916. The 4*l.* a week was paid regularly by the husband.

On February 6, 1917, the wife instituted proceedings for dissolution of the marriage, based on the alleged adultery of the husband and his statutory desertion, consisting of his disobedience to the decree for restitution of conjugal rights. At first the petition was set down as undefended, but subsequently the husband obtained leave to file an answer. In his answer he alleged acts of adultery by his wife in March, April, and May, 1917. Acts of adultery committed by the wife while her petition for dissolution of marriage was pending were established. She was proved to have stayed at an hotel with the co-respondent, and they stayed there as man and wife. At the hearing of the petition the learned judge, taking all the facts into consideration, did not see his way to make a decree for dissolution of the marriage in favour of the husband, although the wife's adultery was not contested. The husband thereupon presented a petition asking that the order for periodical payments might be varied and that the payments to be made thereunder might be discontinued. In opposition to that the wife took up the position that the petition contained no ground for the payments not being continued, and asked that the petition might be dismissed. The application was referred to the registrar, who reported in favour of the husband, and the learned judge confirmed that report. From this order the present appeal is brought.

Under s. 2 of the Matrimonial Causes Act, 1884, " From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the Court may, at the time of making such decree, or at any time afterwards, order that in the event of such a decree not being complied with within any time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation . . . .' Then by s. 4, " The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and

again revive the same order wholly or in part, as the Court may think just."

The learned judge in deciding the case has carefully considered the facts, and I am satisfied that he did not, as has been suggested on behalf of the appellant, treat the case as one in which he had no discretion, or as one where, upon it being proved that the wife had committed adultery, all periodical payments must necessarily cease. The learned judge has not treated the case in that way, and, in my opinion, it would not be a proper way to treat it. Notwithstanding the admitted adultery of the wife, the discretion of the Court to order such periodical payments as may be just remains, and by s. 4 the Court may subsequently review the position, and in doing so the Court should have regard to the conduct of the parties, and more particularly the conduct of the wife. That is what the learned judge has done. After referring to the adultery of the wife and pointing out the position under s. 2 of the Act he said: "Inasmuch as a decree under that Act does not dissolve the marriage relationship, it follows that it does not relieve the wife from the high duty of continued chastity. To hold otherwise would gravely and obviously impair the requirements of morality, and the interests of social life." Then he proceeded to consider the special circumstances of this case and to consider whether it was just that the order for periodical payments should remain in force, and he said: "In the present case no palliation whatever of the wife's conduct is suggested. She had secured an order for periodical payment of a substantial sum. The husband punctually complied with the requirements of the order. Yet the wife committed adultery with E. Goode, not upon an isolated occasion only, nor under any unusual stress of facts, but habitually and almost openly and without the slightest mitigating circumstances. I must therefore direct suspension of payments under the order of June 13, 1916."

It was urged in opposition that it was not accurate to say that there was habitual adultery, as adultery had been established only on two separate occasions; but, even so, it must be borne in mind that on each of these occasions the wife went to an hotel and stayed there with the co-respondent and that they stayed there as man and wife.

I am of opinion that the learned judge exercised his discretion

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correctly, having regard to all the circumstances, and that the order for periodical payments ought to be suspended. It is not a case where the attitude taken up by the wife was that some allowance should be made to her, and she did not adduce evidence to show that at all events at present she was leading a chaste life. The wife's answer to the husband's petition for suspension of the periodical payments was that it showed no ground for altering the order for payment of 4*l.* a week. That was the issue, and in those circumstances I am of opinion that the order made by the learned judge was the right order. It was not, however, accurately drawn up. The learned judge said that the order for periodical payments should be suspended, and s. 4 of the Act provides that the Court may temporarily suspend the order as to the whole or any part of the money ordered to be paid. The order should be so drawn up, and should follow the words of the statute and temporarily suspend the periodical payments directed to be made by the order of June 13, 1916.

In upholding the decision of the learned judge I wish to point out that the resulting position is not that suggested by counsel for the wife. It is not a final order by reason of which the wife can never obtain an allowance for maintenance. The learned judge has dealt with the question on the existing facts, and his judgment will not, in my view, preclude the wife at a subsequent date and upon a state of facts showing that she is deserving of an allowance from making an application to the Court for a renewal of the periodical payments.

The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. I agree that the order is wrong in form and that it was in fact drawn up contrary to the directions of the learned judge, for the last words of his judgment are: "I must therefore direct the suspension of payments under the order of June 13, 1916." The order ought therefore to be drawn up providing that the payments are to be suspended, and not that the husband is no longer liable to make the payments.

I agree with McCardie J. that s. 4 of the Act of 1884 gives the Court a discretion. The section ends with the words which govern the exercise of all powers given by the section: "as the Court may

think just." These words are commonly used in the Chancery Division to give the Court an absolute discretion, but a discretion, of course, that must be exercised judicially and on an examination of all the material circumstances of the case.

In this case the wife obtained a decree for restitution of conjugal rights, but subsequently to her obtaining that decree and a subsequent order for periodical payments she committed adultery. The judge has taken that fact into consideration and exercised his discretion by suspending the periodical payments. Can it be said that the circumstance of the adultery of the wife is not a fact that the judge could take into account and act upon in exercising his discretion ? It is quite impossible so to hold. I am clearly of opinion that the judge, in the exercise of his discretion, has not proceeded on any wrong or insufficient grounds ; and, that being so, this Court ought not to interfere with the exercise of his discretion.

I agree with the Master of the Rolls that there is nothing in this order which precludes the judge on a further application by the wife from exercising his discretion by again making an order for periodical payments if on consideration of all the circumstances of the case then proved it should seem to him to be just to do so. The order is in effect equivalent to a kind familiar in the Chancery Division where an order is made for something to continue until further order.

For these reasons I agree that the appeal should be dismissed.

DUKE L.J. I agree. It seems to me that the wife was hopelessly wrong in the answer she made to the husband's application. She set up something of the nature of a demurrer, and in effect seemed to treat the decree for restitution of conjugal rights and the order for periodical payments as though they amounted to a licence to commit adultery. It is not necessary to add anything to what has been said by my brethren with regard to the effect of the Act of 1884. I should like, however, to say that the scheme of the Act of 1884 is to institute a humane arrangement under which, if either the husband or wife declines to perform his or her marital duties, instead of imposing heavy penalties upon the offending party, means are found of tempering the hardships resulting from the difficulties which have arisen. But if it could be said that the wife who obtained

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Duke L.J.

a decree for restitution of conjugal rights and an order for periodical payments could then enter on a course of gross misconduct, the intention of the Legislature would have hopelessly failed. That is not the true position. The wife was able to obtain an order that she is to be maintained by the husband on the footing that she was an innocent wife. She is now a guilty wife, and then it is said that the periodical payments ought to be continued on the same footing as if she were an innocent wife. That is an intolerable proposition. The true view is that the Court has an absolute discretion. It can suspend the payments, and at the same time it says to the wife: "You are a guilty wife, but it is not too late even now for you to put yourself in a position to obtain some maintenance by resuming a chaste life." I agree entirely with what has been said by the Master of the Rolls and Warrington L.J. as to this aspect of the case.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the husband: *W. R. Millar & Sons.*
Solicitors for the wife: *Barnes & Butler.*

W. I. C.

ADMIRALTY. 1918

(In Prize.) *June* 6.

THE ALFRED NOBEL.

THE BJÖRNSTERJNE BJÖRNSON.

THE FRIDLAND.

[1917, No. 1661.]

Prize Court—Contraband Cargoes—Release—Decree obtained by Fraudulent Evidence—Rescission of Decree.

By fraudulent suppression of the true facts, the claimants, a Copenhagen firm, obtained a decree that the proceeds of certain consignments of lard, which had been seized ex three neutral vessels, should be released to them on the ground that the consignments were shipped to them as bona fide purchasers to be sold to customers in Scandinavia and were not intended to be sent on to Germany. The Procurator-General, on behalf of the Crown, appealed. Before the appeal had been heard, evidence, which was not available at the time of the hearing, was obtained that at the material time the claimants were engaged in exporting lard in considerable quantities to Germany, and that the sole proprietor of the claimants' firm, who had sworn the affidavit which had been instrumental in obtaining the release, had been convicted in Denmark of fraud on the Danish insurance company which had insured other consignments of lard on the claimants' declaration that no foreign interest was involved, whereas in fact the claimants had contracted to sell all the goods mentioned in the insurance policies to Germany.

Thereupon the Procurator-General issued a fresh writ claiming a decree that the order for release be rescinded :—

Held, that the rule that a Court has inherent right to set aside its own order if procured by fraud applies to the Prize Court as strongly as to any other Court ; that had the whole of the facts been put before the Court the order for release would not have been made ; and, accordingly, that the order would be rescinded and the proceeds of sale condemned.

Judgment in *The Kim*, *The Alfred Nobel*, *The Björnsterjne Björnson*, and *The Fridland* [1915] P. 215, so far as it relates to the claims of Christensen & Thögersen (pp. 255 and 287), rescinded.

Action by the Procurator-General on behalf of the Crown for a decree that an order of the learned President dated September 16, 1915, so far as it directed a release of certain goods claimed by Christensen & Thögersen, or the net proceeds thereof, be rescinded,

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on the ground that it was obtained by fraud, fraudulent evidence, and fraudulent suppression of facts; and for an order that the goods or their proceeds be condemned as prize.

Quantities of lard and beef casings shipped by three Chicago packing-houses, Morris & Co., the Cudahy Packing Company, and Armour & Co., on three neutral vessels, the *Alfred Nobel*, the *Björnsterjne Björnson*, and the *Fridland*, in October, 1914, for carriage to Copenhagen, were seized as prize. Their release was claimed by Christensen & Thögersen, a Copenhagen firm, on the ground that they had bought the goods from the shippers, and that, as to a greater part of the goods, the claimants had sold them to their own customers in Scandinavia. An affidavit by Carl B. Thögersen, the sole proprietor, sworn on February 27, 1915, was filed, in which he stated that all the customers of his firm were resident in Scandinavia and that the firm had not either before or since the outbreak of war sold any goods to the Government of any Power at war with Great Britain, or to any persons known to be trading with any such Government.

In the course of his judgment (1) the President said that, while he could not doubt that the claimants did sell to Germany large quantities of goods imported from the American meat packers, upon the whole he had come to the conclusion that the particular goods claimed were shipped to them as bona fide purchasers and not as agents, and he ordered the goods or the net proceeds thereof to be released.

The Procurator-General entered an appeal. Before the appeal was heard information was obtained that on October 14, 1916, Thögersen had been sentenced to three years' imprisonment and a fine of 477,000 kroner in connection with a series of frauds on the Danish War Risk Insurance Commission. From the judgment of the Criminal Court of Copenhagen it appeared that Thögersen had insured certain cargoes of lard on the terms, inter alia, that the policies should be valid only on condition that the goods were forwarded to a specially named consignee residing in Denmark, and that Denmark should be the final destination of the goods. These goods were seized as prize, and Thögersen claimed under the policies and declared upon oath that all the parcels of goods named "never

(1) [1915] P. 215, 256.

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belonged to anybody other than ourselves after the goods were transferred by our American vendors to us as our property," and further, " that no foreign interest whatever is attached to the payment of the policies mentioned." In fact, Thögersen had in January and February, 1915, sold or offered to sell the whole of the parcels to Germany. These facts having come to the notice of the Insurance Commission, Thögersen was prosecuted and convicted.

On July 25, 1917, the writ in the present action was issued. Christensen & Thögersen did not put in an appearance to the writ and were not represented at the hearing.

Gordon Hewart S.-G. and *R. A. Wright K.C.* for the Procurator-General. Every Court has inherent jurisdiction to set aside a judgment obtained by fraud. There are numerous authorities to that effect: see *Cammell* v. *Sewell* (1); *Birch* v. *Birch* (2); *Bright & Co.* v. *Sellar* (3); *Boswell* v. *Coaks* (4); *Castrique* v. *Imrie* (5); *Abouloff* v. *Oppenheimer & Co.* (6); *Vadala* v. *Lawes.* (7) The statement that the claimants' customers were all resident in Scandinavia, and that the claimants had not either before or since the outbreak of war sold any goods to the enemy Government or to enemy persons, was untrue in fact and would have been sufficient to support a charge of perjury. The affidavit of Thögersen constituted a fraud on the Court, as it produced, and was intended to produce, upon the mind of the Court an impression which was the complete reverse of the truth. Had the facts disclosed in the criminal proceedings been put before the Prize Court at the hearing it would not have been possible for the Court to have come to the conclusion that the goods in question were shipped to the claimants as bona fide purchasers.

THE PRESIDENT (SIR SAMUEL EVANS). The Crown make an application for an order to set aside the order for the release of the goods or their proceeds, which I made upon the claim of Christensen & Thögersen in the case of the *Kim*. They make that application upon facts which have come to the knowledge of the Crown and the Crown's advisers since the judgment which I delivered, and the said

(1) (1858) 3 H. & N. 617.
(2) [1902] P. 130.
(3) [1904] 1 K. B. 6, 12.
(4) (1894) 6 R. 167.
(5) (1870) L. R. 4 H. L. 414, 433.
(6) (1882) 10 Q. B. D. 295.
(7) (1880) 25 Q. B. D. 310.

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order which I made, on September 16, 1915. The conclusion to which I came—reluctantly, as I think is shown by the expressions used in the judgment—was that, upon the evidence as then laid before me, the goods claimed were shipped to them as bona fide purchasers, and not as people who acted as agents for some of the American meat packers in order to get the goods into Germany. The new facts which have been ascertained by the Procurator-General and are now laid before the Court show that at that very time goods of this description which had been shipped in some cases by the Cudahy Company were either transferred by the claimants to Germany direct, or that attempts were made in defiance of the declarations they had made when they effected the insurance, to get the goods sent to the enemy country.

The real question which I have to decide now is whether or not, if the whole of the facts had been truthfully put before me when I dealt with their claim in the *Kim* cases, I should have come to the conclusion which I then did. Now it is said by the Crown that the whole truth was not put before me, and it clearly was not. There was clearly a suppressio veri, and there was, I think, more than a suggestio falsi—there was an expressio falsi. The statement made by Thögersen, the proprietor of this firm, was that all his customers were in Scandinavia, that some of the goods had been sold already, or contracted to be sold, to such customers, and that those goods which had not been contracted to be sold were intended also for Scandinavian customers, and intended in that way to be incorporated into the common stock of Scandinavia, and were not intended to be sent into Germany.

Every Court has the inherent right to set aside an order which it has made if it has been procured by fraud ; and that rule applies to the Prize Court certainly as strongly as it does to any other Court. It cannot be too well known that claimants who desire to establish their claims must put their cases honestly, fairly, candidly, and fully before the Court. That has been said in the course of the last three years or so over and over again. So far from having done that, the deponent in this particular case unfortunately stated what was untrue, and impliedly what was false, by suppressing material facts which ought to have been laid before the Court. Just as he has suffered punishment for conduct of that kind in his own country

—and very severe punishment by imprisonment and fine—so he suffers such punishment as this Court can impose upon him by losing the goods, or the proceeds of the goods, which by the original order I had released in his favour. I rescind the order which was made, and I declare that these goods were confiscable as prize; and I condemn their proceeds as such.

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Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

[IN THE COURT OF APPEAL.]

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June 10, 11.

THE RAVENNA.

[1917, fol. 417.]

Admiralty—Collision—Narrow Channel—Vessel starboarding to proceed up the Channel—Starboard Helm Signal—Down-coming Vessel not thereby invited to pass Starboard to Starboard—Regulations for Preventing Collisions at Sea, arts. 19, 25, *and* 28.

The plaintiffs' steamship *Rose*, proceeding to the southward down North Lowestoft Roads, sighted the defendants' steamship *Ravenna*, at anchor and heading to the eastward distant about two miles, and bearing fine on the starboard bow. The *Ravenna* was getting under way, and, having hove up her anchor, put her engines ahead, starboarded her helm to cross the channel and proceed up to the northward, and twice sounded two short blasts on her whistle. The *Rose*, taking these signals as an invitation to pass starboard to starboard, answered each of the *Ravenna's* signals with a signal of two short blasts, and starboarded her helm. The *Ravenna* continued on, putting her engines first half speed and then full speed ahead, and the two vessels came into collision, the stem of the *Ravenna* striking the starboard bow of the *Rose*. Just before the collision the engines of the *Ravenna* were reversed full speed astern:—

Held, affirming the decision of the Court below, that the Roads must be regarded as a narrow channel; that the *Rose* was not justified in assuming that the *Ravenna's* starboard helm signals were an invitation to her to pass starboard to starboard, and that she was to blame; but, reversing the decision of the Court below, that the *Ravenna* was also to blame for not taking off her headway when she had received a clear indication that the *Rose* was not doing that which she was expected to do and which she ought to have done, namely, to keep to the starboard side of the channel.

Decision of Hill J., ante, p. 26, varied.

APPEAL from a decision of Hill J. in an action of damage by collision.

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The plaintiffs (appellants) were the owners of the steamship *Rose;* the defendants (respondents) were the owners of the steamship *Ravenna.*

The collision happened on the morning of May 19, 1917, in North Lowestoft Roads. The wind was south-east light, the weather fine, and the tide the first of the flood, of little force. The *Rose,* a vessel of 872 tons gross and 200 feet in length, was bound down the Roads to the southward on a voyage from Goole to London with a cargo of coal. The *Ravenna,* a vessel of 1169 tons gross and 248 feet in length, had been lying at anchor to the south-west of the Holm End Buoy and was getting under way to proceed up the Roads on her voyage to West Hartlepool. The *Rose* sighted the *Ravenna* about two miles away fine on the starboard bow. She was observed to be getting up her anchor, and the engines of the *Rose* were accordingly put to slow and she continued on her course following another vessel ahead of her and a little on her starboard bow. Shortly afterwards the *Ravenna,* having got in her anchor, put her engines slow ahead and starboarded her helm to get on to her course to the northward, and two short blasts were sounded on her whistle. The *Rose* sounded two short blasts in reply, stopped her engines, and starboarded her helm as much as was prudent having regard to a mine-sweeper which was at anchor on her port bow, and then steadied. Shortly afterwards the *Ravenna,* which had put her engines first at half speed and then at full speed ahead, sounded a second starboard helm signal. The *Rose* answered with two short blasts and very soon afterwards put her engines full speed astern. The *Ravenna* did not reverse her engines until the very last and at the time of the collision still had substantial way. The *Rose* had no headway.

Hill J. held that the Roads must be regarded as a narrow channel and that the *Rose* should have kept to that side of it which lay on her starboard side; that she was not justified in assuming that the *Ravenna's* starboard helm signals were an invitation to her to pass starboard to starboard; and that she was therefore to blame. His Lordship also held that the *Ravenna,* by the starboarding of the *Rose,* was put in a position in which, owing to the near proximity of another vessel passing astern of her, she could do nothing, and that she was not in fault for not reversing sooner. The plaintiffs appealed.

Bateson K.C. and *D. Stephens* for the appellants.

Balloch and *Dumas* for the respondents.

[The arguments on the question of the meaning to be attached to the starboard helm signal (art. 28 of the Regulations for Preventing Collisions at Sea) were the same as in the Court below. The appellants cited *The Skipsea* (1) on the question whether the *Ravenna* was entitled to cross the channel at the time she did, and *The Anselm* (2) as to the indication by sound signals of the course "authorized or required" with reference to another vessel in sight.]

PICKFORD L.J. This is an appeal arising out of a collision in the North Lowestoft Roads between the steamships *Rose* and *Ravenna*. The *Rose* was proceeding to the southward down the channel. There has been a discussion as to whether the channel is to be considered at that time as lying between the sand banks and the mainland or as between the buoys and the mainland. I do not think it matters very much, but I am inclined to think that the learned judge below was right in saying that the channel at that time was a restricted channel between the buoys and the mainland.

The *Rose* was proceeding down, at first, I think, a little to the starboard side of that channel. The *Ravenna* was lying at anchor in a position which is described as south-west from the Holm End Buoy, three to four cables off. She was sighted at anchor at some distance by the *Rose*, but she did not see the *Rose* until that vessel was very much nearer to her. She proceeded to get up her anchor, intending to cross the channel under starboard helm and pass to the northward, and the first question is whether the *Ravenna* was doing that at a time when it was risky. The learned judge has held, finding the distances as he did, that it was imprudent for the *Ravenna* to have got under way at that time, and that she ought to have waited until the southward-bound vessels had got clear. I do not see any reason for dissenting from the learned judge's finding of fact as to distances or his consequent finding that it was imprudent for the *Ravenna* to get under way at the time she did under those circumstances. She got under way and she gave a starboard helm signal, On seeing that the *Ravenna* was getting under way the *Rose* put her engines to slow, and, on hearing the starboard helm signal from

(1) [1905] P. 32. (2) [1907] P. 151.

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the *Ravenna*, answered it by starboarding and by giving a starboard helm signal. The *Ravenna* repeated her starboard helm signal.

The *Rose's* case was that she had starboarded as much as was prudent having regard to a mine-sweeper that was lying at anchor on her port bow, but when the *Ravenna* gave her second starboard helm signal the *Rose* again sounded a starboard helm signal in reply. The *Ravenna* continued to come on after she gave her second starboard helm signal, and the engines of the *Rose* were put full speed astern and her whistle sounded three short blasts; and the learned judge has found, and I see no reason to dissent from him, that at the time of the collision the way was off the *Rose*.

Now, what did the *Ravenna* do? She continued on, at any rate, after hearing the second two blasts of the *Rose*. I think she ought to have heard the first two blasts also, but admittedly on hearing what was in fact the second two blast signal she continued on and put her engines, which were working at slow, half speed and then full speed ahead. Just before the collision she reversed. The vessels came into collision, the stem of the *Ravenna* striking the starboard bow of the *Rose* at an angle of something less than a right angle—nearly a right angle, but leading a little aft on the *Rose*.

The learned judge has held the *Rose* alone to blame. The first question is, Was the *Rose* alone to blame? In my opinion she was obviously to blame. She was in a channel which, under any view of the facts as regards its width, was a narrow channel, and prima facie the *Rose* should have kept to the starboard side. I agree with the learned judge that it is not a case in which the crossing rule applies. If it does, the same obligation, I think, would be upon the *Rose*. But I do not think it does apply, and therefore I do not trouble about it. Prima facie the *Rose* ought to have kept to her starboard side of the channel. Prima facie she certainly ought not to have starboarded across the course—the possible course—of the *Ravenna*.

Her case is that as the *Ravenna* blew a starboard helm signal she was justified in thinking that the *Ravenna* would keep that starboard helm in such a way as would enable the *Rose* to pass starboard to starboard. The *Rose* interpreted the signal as meaning not only that the *Ravenna* was carrying sufficient starboard helm to take her on to her proper side of the channel, but that she was carrying sufficient starboard helm to take her to the starboard side of the

Rose, and therefore the *Rose* used her starboard helm to give the *Ravenna* more room on that side.

The *Rose* was not justified, in my opinion, in interpreting the signal in that way at all. I agree with the learned judge that, with the exception of that mistake, her navigation was prudent and proper. I also agree with his finding that the starboarding on her part was improper, and that she relied only on the signal of the *Ravenna* to justify her in that manœuvre. She says that but for that signal she would not have done it and ought not to have done it. Therefore, upon her own showing, she was to blame. She was not justified in doing anything of the sort, and I agree entirely with the learned judge.

The other question is whether the *Ravenna* is to blame. Now what is the position of the *Ravenna?* She was going to cross the channel under starboard helm sufficient to get her head to the northward, and to go up channel. She expected, she says, the *Rose* to port, or, at any rate, to keep her course and not to starboard. Was she justified in so expecting? I do not think she was. She had the clearest possible indication that the *Rose* was not doing that which she expected she would do and ought to do. That put the *Ravenna*, I think, in some difficulty, just as she had put the *Rose* in some difficulty in getting under way at an improper time.

What the *Ravenna* did was, as I have said, to increase her speed, putting her engines first to half speed and then full speed ahead, and she did nothing to take her way off until the very last moment. Whatever headway she had—I agree she had not the seven or eight knots spoken to by the other side—but she had sufficient headway to do very serious damage indeed to the *Rose*, and, after she had damaged the *Rose*, to continue on so that she ran into a mine-sweeper beyond her. The *Ravenna* says that she was forced on to the mine-sweeper by the speed of the *Rose*. That is untrue, according to the learned judge's finding, with which I agree, and if it was not caused by the speed of the *Rose* forcing her on to the mine-sweeper it was caused by the speed of the *Ravenna*. In these circumstances, was it right for her to carry on as she did? Her only reason for doing so is, as she says, that she was always expecting the *Rose* to port. Now the *Rose* had given her a most distinct indication that she was not porting. The question is whether the *Ravenna*, in these

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circumstances, was justified in continuing on as she did without any reason for thinking that the *Rose* was going to do the right thing and with every reason for thinking that she was going to do the wrong thing. The *Ravenna* had substantial headway. If she had taken it off the collision might have been avoided. I do not say that it would, but it might have been. In my opinion, and our Nautical Assessors agree with me, if she had that substantial way as found by the learned judge, she ought to have reduced her speed earlier. Therefore she is to blame. The point is made on behalf of the *Ravenna* that she could not do that because of another vessel passing astern of her. That is entirely a point made by counsel; there is no trace in the evidence of that being the reason why the *Ravenna* did not stop and reverse. Her master gave as the reason that he "was always expecting the *Rose* to do the right thing and port." It has been held in very many cases that a vessel is not justified in carrying on in a position of danger up to the last moment expecting that the other vessel will do the right thing, especially when there has been an indication that the other vessel is not doing the right thing.

The result, therefore, in my opinion, is that both these vessels were to blame and in equal degrees. The result of that will be according to the practice established in the Admiralty Court, that there will be no costs on either side here or in the Court below.

BANKES L.J. I am of the same opinion.

WARRINGTON L.J. I agree.

Solicitors for plaintiffs (appellants): *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants (respondents): *Thomas Cooper & Co.*

E. C. T.

ADMIRALTY.

(In Prize.)

1918
June 5, 14.

THE ZAANLAND.

[1916, No. 1027.]

Prize Court—Insurance—Payment by Neutral Underwriters after Seizure —Claimants no longer Owners of Goods—Property in Insurers— Effect.

Where claimants to goods seized as prize have after seizure parted with their rights to the goods to other persons, whether insurers or not, and have so ceased to be the owners of the goods, their claim fails and the Court will not order the release of the goods to them.

Action for the Condemnation of 150 Casks of Sausage Casings shipped on board the Dutch steamship *Zaanland* at Buenos Aires for carriage to Rotterdam.

The claimants (the shippers) were Penelas Morini & Grosso, of Buenos Aires; the consignees named in the bill of lading, which was dated December 31, 1915, were the Netherlands Oversea Trust for Gustav J. J. Witt & Co., of Rotterdam.

The goods were seized in the Port of London on March 8, 1916. On June 29, 1916, Witt & Co. filed a claim on the ground that they were the neutral owners of the goods. That claim was abandoned, and for it was substituted a claim, filed on October 2, 1917, on behalf of Penelas Morini & Grosso, who alleged that the property in the goods remained in them. The goods had been insured by Witt & Co. against risk of capture with three Dutch underwriters for 26,000 fl. After seizure, in accordance with the terms of the policy, the underwriters paid Witt & Co., who in turn on September 19, 1917, remitted 22,000 fl.—a sum which covered the invoice value and the freight—to the claimants. According to the evidence filed on behalf of the Crown, Gustav J. J. Witt was the proprietor of a firm of the same name carrying on business in Hamburg.

Sir Gordon Hewart S.-G. and *Trickett* for the Procurator-General.

Balloch and *Darby* for the claimants.

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[It was argued on behalf of the Crown that Witt & Co. were merely a channel through which all parties intended the goods to be sent to Germany; and, further, that, having been paid in full, the claimants had ceased to be the owners of the goods, and that on that ground also their claim failed: *The Palm Branch* (1) and *The Gothland*. (2)

For the claimants it was contended that neither of the cases cited were authorities for the Crown's proposition. In *The Palm Branch* (1) the insurers were German underwriters, and in *The Gothland* (2), although the claim was put forward by a neutral insurance company, the owners at the time of seizure were a firm of German merchants. Where both the owners at the time of seizure and the insurers were neutral different considerations applied. In common law and Admiralty actions it was an every-day occurrence for the nominal plaintiffs to have been paid and for the real claimants to be the insurers. If the claim of the neutral owner of goods was to be barred because, after the date of seizure of the goods, he had been paid by the insurers, while the Court at the same time declined to regard the interest of the insurers, no insurance company could fulfil its obligations under the policy until the action in prize had been heard.]

Cur. adv. vult.

June 14. THE PRESIDENT (SIR SAMUEL EVANS). The Crown asks for condemnation of the proceeds of a consignment of 150 casks of casings shipped on the *Zaanland* by Penelas Morini & Grosso, of Buenos Aires, under bills of lading made out to the Netherlands Oversea Trust for Gustav J. J. Witt & Co., of Rotterdam.

The first claim to the goods was made by Witt & Co. on June 29, 1916, on the ground that they were the "neutral owners." This claim was abandoned. For it was substituted one by Penelas Morini & Grosso, field on October 2, 1917. It was contended that the property had remained in them; and it was alleged that the goods were destined for Holland for consumption in that country, and had no enemy destination.

The evidence adduced in the present proceedings does not require to be dissected and explained in as great detail as has often been the

(1) [1916] P. 230. (2) [1916] P. 239, n.

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case when shipments captured on voyages to Holland and Scandinavia have come before this Court. For it was admitted—as indeed the documents amply showed—that the claimants had been in the habit of consigning goods to agents in Europe, including Witt & Co., to neutral ports with the object of disposing of them in the profitable markets of Germany, and that they desired to continue to do so notwithstanding the increase of the risk of capture. But the contention was that the particular goods now in question were sent bona fide to agents in Rotterdam to carry out a contract with neutral purchasers in Amsterdam, who declared and honestly intended that the goods should form part of the common stock of Holland and be consumed in that country. These purchasers were said to be the General Provision Company of Amsterdam.

Reliance was placed on the fact that the goods were consigned to the Netherlands Oversea Trust for Witt & Co., the agents. At the end of 1915 it was inconveniently difficult to ship such articles as these to Holland unless it was done through the Trust. But even where the sanction of the Trust had been obtained, it is notorious that persons engaged in trade of a contraband nature attempted to circumvent the obstacles, and to escape the consequences of the breaches of obligations entered into with the Trust. Some succeeded ; others were detected, and suffered. One main question of fact, therefore, to be investigated in this case is whether it was honestly intended by Witt & Co. and the General Provision Company to carry out the ostensible object of the consignment made through the Trust by adherence to the word and spirit of the obligations involved.

The case was founded first upon the affidavit of Theodor Thomsen, the only director of Witt & Co., of Rotterdam. He was a German, but he said he had for years resided at Rotterdam. According to the Crown's evidence Gustav J. J. Witt himself, the proprietor of the firm of the same name at Hamburg, was a German resident in Hamburg, and this has not been denied. It was said that the goods seized formed part of a quantity sold to the General Provision Company on December 8, 1915. A letter of that date purporting to confirm the sale was relied upon. That document did not specify any price, or any terms as to payment, insurance or delivery, or any of the particulars usual and necessary in such a contract. A letter

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written by Witt & Co. to Penelas & Co. a fortnight later is inconsistent with a sale having already taken place. The bills of lading were dated December 31, and on the same date a "consignment invoice" was sent to Witt & Co. amounting to 20,950 fl. gross, and 16,946·5 fl. net, with a note at the foot: "Goods, C.I.F. Amsterdam." On January 26, 1916, when the goods were afloat, it was said that the General Provision Company wrote to Witt & Co. that they were willing to take the goods at the invoice price "under known conditions, payment against bill of lading after it has been endorsed by the N.O.T."

Thomsen in his affidavit said that the goods were insured with three Dutch underwriters for 26,000 fl., and that the insurance was covered on behalf of Witt & Co. by the General Provision Company. The policy contains no reference to the General Provision Company. The insurance was for a fixed value, and that sum was paid; but no evidence was given as to how and by whom payment was made. Witt & Co. afterwards paid the claimants (Penelas & Co.) for the goods in an account sale of 22,000 fl. on or about September 19, 1916. An aspect of the case arising from this payment will be referred to hereafter.

No communication passing between Witt & Co. and the General Provision Company was produced or mentioned from January 26, 1916, until a letter of October 27, 1916. No correspondence exchanging views about the seizure, or about the insurance (which it was said had been covered by the General Provision Company), or about anything else touching the goods, was disclosed. The letter of October 27, 1916, was a statement made at the request of Witt & Co. It appears to be a statement made in order to justify a refusal, or which did in fact refuse to disclose the company's books. The only evidence supplied by the General Provision Company was an affidavit (sworn in September, 1917) made by the manager of the Amsterdam office. It alleges the purchase, and contains the statement that the goods were to be dealt with "as other casings imported into Holland by the said General Provision Company, namely, to be unfatted, cleaned, and sold to butchers and wholesale dealers in Holland." It is silent as to any insurance effected by or through the company. It is not a helpful piece of evidence.

The only affidavit made for Penelas Morini & Grosso was that of

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Angel Grosso, sworn on March 14, 1918. It is so meagre as to be worthless. It says nothing about the alleged sale to the General Provision Company, or about the insurance of the goods, or about the fact that Penelas & Co. had been paid for them a year and a half before.

In the investigation and testing of the claim obvious questions like the following arise : Who were the General Provision Company ? What is their history since the war ? Ought the Court upon the evidence adduced to rely upon the allegations that they bought the goods for consumption in Holland ? Or, if not, what are the reasonable and proper inferences from the facts ?

The General Provision Company has already been before this Court. Thirty tierces of casings consigned to it at Rotterdam through a firm carrying on business in Chicago and Hamburg towards the end of 1915 were condemned by this Court last year in the case of the steamship *Noordam.* (1) The company entered a claim to those goods, but its counsel said that he was instructed not to proceed with the claim. On January 28, 1916, the company seems to have written a letter to a Mr. Laurence, a merchant in San Francisco, to which that merchant replied in an intercepted letter, dated March 3, 1916, exhibited to the Crown's affidavit. The company's letter was written a couple of days after the alleged final acceptance by the company of the goods now claimed by the claimants, so that it reveals the attitude and conduct of the company at a material time. The reply shows that the company had said that it could and would receive casings in Holland for transmission into Germany. No officer of the company has given an answer upon this matter ; but a letter from the claimants' legal adviser in Holland was read by counsel. This admitted the receipt of the letter from Mr. Laurence, but denied that the company had written the letter to which it purported to be a reply. A feeble explanation was put forward that the letter written in the name of the company was the clandestine work of a German clerk in the company's office. I cannot accept this story. The company also, according to the evidence filed on behalf of the Crown, exported to Mannheim about forty tons of meat in August, 1916. This has not been denied. Again, an intercepted letter of March 14, 1916, shows the relationship

(1) Unreported.

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of the company—which is there indicated as "G.P.C."—with Brecht, of St. Louis, and Brecht, of Hamburg, in dealings with goods of the same description as those now in question.

It is not necessary to go into further particulars about the activities of the company with Brecht; Schaub & Co.; Leube; the Algemeene Commissie Venootschap; and other persons and firms carrying on trade in contraband goods with Germany. The conclusion to which the evidence has led the Court is that Witt & Co. procured the consent of the Netherlands Oversea Trust to the consignment of the goods through the Trust to Witt & Co. on the pretence that the goods were sold to the General Provision Company for consumption in Holland; whereas in truth and in fact Witt & Co. and the General Provision Company acted only as channels through which the goods were intended by all parties concerned to be sent to Germany; and the ship's papers did not disclose the real consignees and purchasers. I therefore disallow the claim. I declare that the goods were destined to the enemy at Hamburg, a base of supply and of warlike operations; and being conditional contraband they were subject to seizure and confiscation. Their proceeds therefore will be condemned as good and lawful prize.

When I set out some of the facts relating to the insurance of the goods and the payment of the insurance moneys to Witt & Co. and the payment by Witt & Co. to the claimants for the goods, I stated that these circumstances would be further referred to as they raised an aspect of the case which required consideration.

It came out in the evidence that a full year before the claimants filed their claim they had been paid in full for the goods. Accordingly, if the goods or their proceeds were released to them they would be paid twice over. The letters relating to the payment of the insurances indicate that the payment was made upon the transfer of the documents and all rights of the consignees to the goods. I note in passing that after the payment was made to the claimants Witt & Co. wrote to them that it would be advisable that they should write to the solicitors that the goods were not paid for by Witt & Co. The insurers appear to have been three separate underwriters. The letters referred to speak of "the Insurance Company." No evidence was given as to who paid the insurance

moneys. There may have been reinsurances: and in all probability there were. It has often been found in this Court that insurances and reinsurances have been effected by German companies or underwriters in respect of goods consigned in the names of neutrals, and insured in the first instance in neutral countries.

Where the claimants have after seizure parted with their rights to the goods to other persons, whether insurers or not, and have so ceased by their own acts to be the owners of the goods, no order will be made for release of the goods to them. Such an order might enure to the benefit of the enemy as insurers or reinsurers, or in some other capacity. If goods claimed have ceased to belong to claimants before they came into Court to prove their title as owners, their claim must fail: see *The Prinz Adalbert.* (1) I should add, however, that although the Court will not undertake to inquire into the interests of insurers, underwriters, or transferees sought to be protected under cover of a claim in the names of claimants who were owners at the time of seizure, nevertheless, if it transpires in the course of the proceedings that an order for the release of goods or proceeds to the nominal claimants would in fact enure to the benefit of enemy subjects, the Court will decline to make an order which would have that effect: see *The Palm Branch.* (2)

Upon the evidence on this part of the case my conclusion is that, assuming the claimants were the owners of the goods at the time of seizure, they had ceased to be the owners at the time of their claim and of the hearing; and upon this ground also their claim must be disallowed.

Solicitor for Procurator-General: *The Treasury Solicitor.*
Solicitors for claimants: *Pritchard & Sons.*

(1) [1917] A. C. 586, 591. (2) [1916] P. 230.

E. C. T.

1918
June 26.

ADMIRALTY.

THE VALMONT.

[1917, fol. 348.]

Admiralty—Collision—Unlighted Vessel at Anchor—Prohibition to exhibit Lights—Duty to show Hand Light—Humber Regulaitons made under Defence of the Realm (Consolidation) Regulations, 1914.

Under a regulation made under the Defence of the Realm (Consolidation) Regulations, 1914, "no lights whatever" are to be exhibited by vessels anchored in the river Humber between certain limits therein specified :—

Held, that this regulation does not mean that a vessel ought not to show a hand light in case of emergency in order to prevent a collision immediately threatened.

Action of Damage by Collision.

The plaintiffs were the owners of the sailing vessel *Charlotte Kilner*, her cargo and freight, and her crew suing for their lost effects. The defendant was C. E. Bates, R.N.R., the officer in charge of the navigation of H.M. trawler *Valmont*.

The collision took place in the Humber on the evening of December 20, 1916. The *Charlotte Kilner*, a ketch-rigged sailing vessel of 84 tons gross, was lying at anchor in the Humber, and, in compliance with a Humber by-law promulgated on July 18, 1916, under the Defence of the Realm Regulations, was exhibiting no lights. The steamtug *Finlay*, which was about to take the *Charlotte Kilner* in tow, was lying alongside, and her rope had been put on board the ketch and was being made fast. The *Finlay* was carrying certain lights, all of which were burning brightly. In these circumstances the trawler *Valmont*, navigating up the river, collided with the *Charlotte Kilner* and did her so much damage that she sank almost at once.

According to the defence, the *Valmont*, whose under-way lights were duly exhibited, was making about six knots when a dark object which proved to be the *Charlotte Kilner* was seen close to ahead. The engines were at once put full speed astern and the helm was hard-a-starboarded, but notwithstanding these measures the collision took place. Before the collision the lights of the *Finlay*

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had been seen distant about one and a half miles, and as she was a crossing ship the *Valmont* kept course and speed for her.

The defendant alleged, inter alia, that the *Charlotte Kilner* was negligent in not showing any light or lights in time to avoid collision or at all.

The action was heard in camera. The arguments, so far as proper for publication, appear in the judgment.

Bateson K.C. and *D. Stephens* for the plaintiffs.
Aspinall K.C. and *C. R. Dunlop* for the defendant.

THE PRESIDENT (SIR SAMUEL EVANS). The collision in this case took place in the vicinity of the mouth of the Humber on December 20, 1916. The plaintiffs bring their action against the defendant, alleging negligence against him, for which they seek to make him responsible for the loss of the *Charlotte Kilner* and her cargo and freight, and for the loss of the effects of the crew, the *Charlotte Kilner* having sunk in two or three minutes after the actual collision. There is no counter-claim, and the question therefore is whether or not the plaintiffs have in the circumstances of this case brought home negligence to the defendant.

The circumstances are simple, and I think upon the evidence the right conclusion is fairly clear.

The *Charlotte Kilner* had been at anchor in the locality which had been indicated to her by the authorities from 3.30 P.M. until the collision, and at the time of the collision she was prepared to go away from her anchorage in tow of another vessel which had come quite close to her, namely, the tug *Finlay*. The *Valmont* was the second of two trawlers passing up the Humber. The first of the two, the *Waldorf*, had passed the *Charlotte Kilner* and the *Finlay* when they were alongside of each other, according to the master of the *Waldorf*, and had passed fairly close. The *Finlay* was exhibiting lights, the exact significance of which I do not know, nor do the assessors who are assisting me know what they mean. They were not perhaps necessarily towing lights. They may have been lights which had been ordered, as I have no doubt they were, by some local authority.

Two points were made by counsel for the defendant. The first was that the negligence, which was necessary to enable the plaintiffs

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to succeed, had not been established. In the next place, he said the collision ought to be accounted for, not by any negligence on the part of those responsible for the *Valmont*, but because the *Charlotte Kilner* sheered away to the northward and to the eastward. Except in so far as he got some support from one witness, who said that she might have canted about two points, counsel was bound to rely in support of that contention upon the evidence which was given by the master of a Trinity House vessel which was at anchor not very far away. The collision took place a very long time ago, and it is not surprising that people should have forgotten some of the circumstances, especially if they themselves were not immediately concerned with either of the vessels which came into collision, and without saying anything, or even suggesting anything, against the honesty of that witness, I will say at once that I think his evidence is quite unreliable, and that it would be not only unsafe, but quite wrong, to act upon the evidence which he gave—he was obviously mistaken.

The vessel at anchor which was run into was showing no lights. That was in accordance with the rules which were issued in November, 1916, regulating the navigation in the Humber, and counsel for the plaintiffs—in answer to the point which has been put forward on behalf of the defendant, arising from the absence, in a convenient place, of what may be described as an emergency light which could be shown, if it was thought necessary and proper, in order to avert imminent collision—argued that art. 15 was an absolute prohibition against carrying or exhibiting any light in any circumstances. Whether counsel took upon himself to go as far as that I do not know ; it was not necessary for his case. But as he has put forward that argument, I think it is right that I should express my view about art. 15. The regulation in question deals with the lights which may or may not be carried on vessels at anchor in the Humber to the eastward and westward of the meridian of Greenwich. Those to the westward are to exhibit anchor lights as described, except that between the places which are mentioned they are to be reduced in brilliancy. On vessels which are anchored to the eastward of the meridian of Greenwich no lights are to be exhibited. That means that when they come to anchor they are not to show anchor lights. It does not mean, in my judgment, that they ought not to show a

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hand light in case of emergency in order to prevent an accident which may be immediately threatened. However, I do not think that in this case it can be said that there was any contributory negligence on the part of the *Charlotte Kilner*, and I merely make the observation about the rule because of the contention which has been put forward by the plaintiffs' counsel.

I accept the evidence that the *Finlay* had come close to, and was close to, the *Charlotte Kilner* before the collision. When I say " close to " I mean that she was something like 12, 15, or perhaps 20 feet away—it is impossible to say exactly the distance. That she was close to was admitted by the master of the *Waldorf*, the vessel which went up river ahead of the *Valmont*. Her presence there showing these rather unusual lights (she also had her navigation lights out) ought, I think, to have indicated to the persons responsible for the navigation of the *Valmont* that there might be some other craft in the immediate vicinity. But however that may be, I think that although it was a dark night, if there had been an efficient look-out on the *Valmont* something ought to have been done, and could have been done, to avoid such an untoward accident as that which took place. The master gave his evidence to-day. He did not see any dark object. He did not see the *Charlotte Kilner* at all; nor did one of the other witnesses. The mate, who was on the look-out on the forecastle ahead, did see her, but only when she was close to, and instead of reporting her, to indicate what the danger was, he took upon himself to say " Full speed astern on the engines." Thus there was an order given by the master, and an order given by the mate, to go full speed astern, but not in time to produce any effect upon the vessel.

In my opinion the sole blame for this collision must be attached to the *Valmont* for want of proper look-out. Therefore there will be judgment for the plaintiffs, and a reference in the usual course to ascertain the damages.

Solicitors for plaintiffs: *W. & W. Stocken.*
Solicitor for defendant: *The Treasury Solicitor.*

E. C. T.

1918
July 9, 10, 15.

ADMIRALTY.

THE MATTI.

[1917, fols. 805 and 989.]

Admiralty—Salvage—Services rendered by requisitioned German Ship—Claim by Lords Commissioners of the Admiralty—"Ship belonging to His Majesty"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 80—*Merchant Shipping* (*Salvage*) *Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1—*Validity of Orders in Council of March* 22, 1911, *September* 29, 1917, *and June* 4, 1918—*Towage—Agreement between Masters of salving Vessels—Effect.*

A German steamship, seized as prize in a British port on the outbreak of war, was ordered, under a decree of the Prize Court, to be detained until the conclusion of peace or further order. She was subsequently requisitioned by the Admiralty and delivered to the Lords Commissioners of the Admiralty in accordance with the Prize Court Rules. While in the service of the Admiralty she rendered salvage services:—

Held, that she was a ship belonging to His Majesty within the meaning of s. 557 of the Merchant Shipping Act, 1894, and that the Admiralty were therefore precluded from claiming salvage.

By s. 80 of the Merchant Shipping Act, 1906, His Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and Government ships are by sub-s. 3 of that section defined as "ships not forming part of His Majesty's Navy which belong to His Majesty, or are held by any person on behalf of or for the benefit of the Crown." Orders in Council of March 22, 1911, September 29, 1917, and June 4, 1918, promulgated under this section, provided respectively that Government ships in the service of the Admiralty should be included, and that Government ships in the service of the Shipping Controller and of the War Office should be excluded, from the category of "ships belonging to His Majesty" within the meaning of s. 557:—

Held, that s. 80 does not give any authority to the Crown by Order in Council to declare what class of ship is or is not within the category of the ships dealt with in s. 557.

Effect of a towage agreement between the masters of salving vessels considered.

CONSOLIDATED ACTION OF SALVAGE.

The first set of plaintiffs were "the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom and the

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officers and crew of H.M.S. *Comet*" ; the second set were the owners, masters, and crews of the steamtugs *Nunthorpe* and *George Peabody*. The defendants were the owners of the steamship *Matti*.

The *Comet*, a screw steamship of 1471 tons gross, was a German merchant ship which was seized in a British port on the outbreak of war, and was ordered by the Prize Court to be detained by the marshal under the terms of the "*Chile*" order. (1) She was requisitioned on behalf of the Crown by the Admiralty, and at the time of the salvage services was employed as a merchant ship, her actual management being carried on for the Admiralty by the Admiralty Coasting Trade Office through their agents at Newcastle, Newbiggin & Everett, but she was registered in the name of "His Majesty represented by the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland."

From the statement of claim delivered on behalf of the first set of plaintiffs it appeared that the *Matti*, a Norwegian steamship of 2139 tons gross, which had been torpedoed on the night of September 22, 1917, and had been abandoned by her crew, was sighted about eight miles from Flamborough Head on the morning of the 23rd by the *Comet*. The *Comet* was in the course of a voyage from the Thames to the Tyne in ballast. The second officer and two men boarded the *Matti*, and, there being no steam available, hove on board by the hand gear the rope and hawsers necessary for towing. The *Matti* had a large hole in her starboard side and the engine-room and stokehold were full of water. Water was also leaking into the after hold through two empty rivet holes and some started bolts. These holes were plugged, and meanwhile, connection having been established, the *Comet* started to tow the *Matti* to Hartlepool. About 3.30 P.M. the tug *Nunthorpe* came up and asked the master of the *Comet* whether he required any further assistance. The master of the *Comet* replied that he did not, but, after the master of the tug had offered to tow the *Matti* to Smith's Dock, river Tees, for 300*l*., which the master of the *Comet* refused, it was agreed that the tug should tow to Smith's Dock for 200*l*. The officer and men on the *Matti* accordingly took a heaving line from the tug and made her hawser fast at about 4 P.M. The *Comet* continued towing and the

(1) See [1914] P. 212.

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tug assisted by towing on the *Comet's* starboard side. At about 5 P.M., when the *Comet* was about four miles east of the Tees the *George Peabody* came up. The master of the *Nunthorpe* said that the *George Peabody* belonged to his owners, and suggested to the master of the *Comet* that he should make a bargain with her to assist in towing up the river. The master of the *Comet* refused to do so, stating that the 200*l.* already fixed was to cover the assistance of a second tug if necessary when going up the river. The master of the *Nunthorpe* then said he would take the *Matti* to Smith's Dock by himself, and as the *Matti* was then near the entrance to the Tees the master of the *Comet* cast off and left the *Nunthorpe* to tow the *Matti* to Smith's Dock as agreed. The *Comet* then proceeded on her voyage, but the second officer of the *Comet* and boat's crew remained on board the *Matti* in charge. At about 6 P.M. a river pilot came on board and a naval officer with several men, and at the pilot's request the *George Peabody* made fast aft, and the *Matti* was towed up the river and was safely moored at about 8.30 P.M. The second officer remained on board in charge until September 25, when he was relieved by the collector of customs at Middlesbrough.

By their defence the defendants raised the issue that the *Comet* was a ship belonging to His Majesty, and, not being a ship specially equipped with salvage plant or a tug, the Admiralty were not entitled to recover salvage in respect of her services. As regards the services of the tugs, the defendants contended that at the time the *Nunthorpe* came up the *Matti* had been brought into safety, and the services of the *Nunthorpe* and the *George Peabody* were towage services engaged and to be paid for by the Admiralty.

By their reply the first set of plaintiffs alleged that at the time of the salvage services the *Comet* was employed as a merchant ship under the management of Newbiggin & Everett, of Newcastle-on-Tyne, and was not a ship belonging to His Majesty within the meaning of s. 557 of the Merchant Shipping Act, 1894. Alternatively the Lords Commissioners of the Admiralty were entitled to remuneration or indemnity from the defendants in respect of the agreement made by the master of the *Comet* with the master of the *Nunthorpe* for the towage of the *Matti* up the river to Smith's Dock, and the payment of 200*l.* thereunder to the owners of the tug.

The plaintiffs, the owners, masters, and crews of the *Nunthorpe*

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and *George Peabody*, in their reply did not admit the making of the alleged towage agreement; and pleaded alternatively that if any such agreement was made the master of the *Nunthorpe* had no authority to make the same on behalf of the owners of the tugs or to bind them thereby. Further, the agreement, if made, was not made with the defendants or any person on their behalf, and the defendants were not entitled to rely thereon; and also it was inequitable by reason of the inadequacy of the sum payable thereunder and should be set aside. The agreement, if made, was an agreement for towage and not for salvage services, and the services rendered were in fact salvage and not towage.

July 9, 10. *Sir Frederick Smith A.-G.* and *C. R. Dunlop* for the Admiralty and the officers and crew of the *Comet*. The policy underlying s. 557 that, in the case of services of a public character rendered by His Majesty's ships, no salvage is recoverable, has no application to a vessel in the position of the *Comet*. Vessels detained under a "*Chile*" order are in a very anomalous position: see *The St. Tudno*. (1) At the present time the bulk of the mercantile marine has been requisitioned or chartered by the Admiralty, the Shipping Controller, or other Government Departments, and all the vessels in these services could be described as ships belonging to His Majesty. It cannot have been the intention of the Legislature to exclude all such vessels engaged in ordinary mercantile adventures from claiming salvage. By Orders in Council of September 29, 1917, and June 4, 1918, promulgated under s. 80 of the Merchant Shipping Act, 1906, ships in the service of the Shipping Controller and the War Office respectively are declared to be excluded from the category of ships belonging to His Majesty within the meaning of s. 557 of the Merchant Shipping Act, 1894, but by an earlier Order in Council of March 22, 1911, Government ships in the service of the Admiralty are expressly declared to be within s. 557.

[THE PRESIDENT. Sect. 80 does not appear to give authority to make such declarations by Order in Council.]

In any event the *Comet* does not come within either of the Orders in Council and no argument is founded upon them.

In *The Sarpen* (2) Pickford L.J. said: "I do not deny that there

(1) Ante, p. 174. (2) [1916] P. 306, 317.

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may be a requisition under such terms as to give the Crown the dominion as well as the control of the ship, and it may be that in such a case she may be said to belong to the Crown, although not in the ordinary sense belonging to it." See also, as to the position of a ship chartered by demise to the Crown, *Admiralty Commissioners* v. *Page* (1), and, as to the temporary possession amounting to ownership, *The Lemington* (2), and cf. *Weir* v. *Union Steamship Co.* (3) In the present case the *Comet* was under the control and at the expense and risk of the Crown, and that is sufficient to entitle her to salvage although she is not a ship belonging to His Majesty within the meaning of s. 557 : see *The Maria Jane* (4), *The Scout* (5), *H.M.S. Thetis* (6) and *The Beulah.* (7)

Laing K.C. and *Raeburn* for the tugs *Nunthorpe* and *George Peabody.* The alleged agreement to tow for 200*l.* is not binding. The parties were never ad idem as to the exact services to be rendered under the agreement. The masters of the *Nunthorpe* and the *Comet* had no power to bind their owners, and further, the agreement, if made, was inequitable. The fact that the agreement, to which the defendants were not parties, was made between the masters of the two salving vessels does not preclude the *Nunthorpe* from obtaining salvage remuneration from the defendants : see *The Auguste Legembre.* (8)

Bateson, K.C. and *D. Stephens* for the defendants. The Admiralty are in a dilemma ; either the *Comet* is a ship belonging to His Majesty or she is not. If she is, not being a tug or a vessel specially equipped with salvage plant, no salvage is recoverable : see the Merchant Shipping (Salvage) Act, 1916. If she is not, the Admiralty have no claim. There is no intermediate position they can occupy under the terms of the requisition, and none of the cases cited are authorities for the proposition that although not a ship belonging to His Majesty within the meaning of s. 557, the Crown can at the same time claim salvage. [Reference was made to *The Cybele* (9), *Young* v. *Steamship Scotia* (10), and *Symons* v. *Baker.* (11)]

(1) [1918] 2 K. B. 447.
(2) (1874) 2 Asp. M. L. C. 475.
(3) [1900] A. C. 525.
(4) (1850) 14 Jur. 857.
(5) (1872) L. R. 3 A. & E. 512.
(6) (1833) 3 Hagg. Adm. 14, 39, 48, 61, 233.
(7) (1842) 2 Notes of Cases, 61.
(8) [1902] P. 123.
(9) (1878) 3 P. D. 8.
(10) (1903) 9 Asp. M. L. C. 485.
(11) [1905] 2 K. B. 723.

As regards the towage agreement, the master of the *Nunthorpe* agreed with the other salvors to render them a service for 200*l*. The agreement was binding and the tug owners cannot claim for salvage remuneration: see *The Solway Prince*. (1)

Cur. adv. vult.

July 15. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This is a consolidated action for salvage. There are two sets of plaintiffs. The first plaintiffs are "the Commissioners for Executing the Office of the Lord High Admiral of the United Kingdom, and the officers and crew of His Majesty's ship *Comet*." The second are the owners, masters and crews of the steamtugs *Nunthorpe* and *George Peabody*.

The *Matti* was a Norwegian steamship. She was struck by a torpedo when off the north-east coast on a night in September, 1917 She was in ballast. Her value for the purposes of these proceedings was 80,000*l*.

Before any of the plaintiff vessels had seen her the *Matti* had been abandoned by her master and crew. The services in respect of which the claims are made are set out in the two statements of claim. It is not necessary to restate them.

A question of law of public and general importance arises on the claim of the first plaintiffs. It is whether the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom can claim salvage remuneration in respect of the services attributable to the use of a salvor ship. For brevity and convenience I shall call these plaintiffs "the Admiralty." This question depends upon whether the *Comet* was "a ship belonging to His Majesty" within the meaning of s. 557 of the Merchant Shipping Act, 1894. As to the claim of the master, officers and crew, which is brought with the consent of the Admiralty, it is admitted that salvage remuneration for their personal services must be awarded. But if the *Comet* was a ship belonging to His Majesty within the meaning of s. 557, the Admiralty cannot recover salvage money in respect of the ship. This is now well established. It would be a work of supererogation to trace the history of and discuss the reasons of this rule. What, then, was the character of the *Comet* when the services were rendered?

(1) [1896] P. 120.

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It is a little significant, but, of course, not in any degree conclusive, that the Admiralty themselves in their statement of claim, describe the vessel as "H.M.S. *Comet*." Her history, in so far as it is material to the present inquiry, is this. She was a German vessel in a British port at the outbreak of war. She was seized by the proper British authorities and was brought into the Prize Court. On September 16th, 1914, I, as judge of the Prize Court, pronounced her to have belonged at the time of seizure to enemies of the Crown, and as such to have been lawfully seized as prize; and I made an order for her detention in the terms of what has become well known as the "*Chile*" order. Subsequently, early in 1915, an application was made by the Crown to requisition the vessel, on the ground that she was required for the service of His Majesty; and thereupon I made an order that the marshal of the Court should forthwith deliver her temporarily to the Lords of the Admiralty without appraisement, in accordance with Order XXIX., r. 4 (*a*) and (*b*), of the Prize Court Rules then in force by virtue of the Order in Council of September 30, 1914. She was so delivered accordingly; and she has been in the service of the Admiralty ever since.

She was also registered in the Registry of British Ships in the name of "His Majesty represented by the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland," and the certificate of registry designated the Secretary of the Admiralty as the person to whom the management of the vessel was entrusted by and on behalf of the owners. She was so registered at the time when the salvage services were rendered. Her actual management was carried on for the Admiralty by the "Admiralty Coasting Trade Office"—a Department which dealt with the vessel by chartering and otherwise as the owners.

It is in these circumstances that it has to be determined whether or not the vessel is to be regarded as belonging to His Majesty for the purpose of the section referred to.

Temporary ownership by or for the Crown, apart from complete legal ownership, may be sufficient to constitute a ship one belonging to His Majesty. Such a temporary ownership would exist where by a contract with the legal owners the ship was completely handed over to the Admiralty to be navigated by them at their own risk and responsibility; or where the Crown, under the terms of a requi-

sition, exercised the dominion as well as the control over the ship; although in such cases the ship would not in the ordinary sense, or in the technical legal sense, belong to the Crown: vide *The Sarpen*. (1) In accordance with these views it was decided in the case of *Admiralty Commissioners* v. *Page* (2) that where the master and crew of a British ship were appointed by the Admiralty—and not by the legal owners—and the Admiralty bore all the expenses and marine and war risks and the costs of repairs (other than those due to ordinary wear and tear) the right to claim salvage passed from the legal owners to the Admiralty, on the ground that the ship belonged to His Majesty, and was of a class which could claim salvage under the Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. 5, c. 41).

In the present case, while the *Comet* was in the possession of the Crown under the order of the Prize Court, the full dominion and control over the ship and her master and crew were in the Crown through the Admiralty. Of course, the original enemy owners of the vessel would not be completely divested of the res, nor would the latter be transferred to the Crown in a legal sense until a final decree of condemnation of the vessel by the Court of Prize. But, as it is settled law that possession amounting to a temporary ownership in the Crown may constitute a vessel one "belonging to His Majesty," and as a more absolute and complete temporary ownership than existed in the present case could scarcely be conceived, it follows that the *Comet* at the material time must be regarded as a ship belonging to His Majesty. The original enemy owners could not by any possibility lay any claim of salvage service while the ship was in the possession and control of the Admiralty and manned by an Admiralty crew. In truth, the ownership of the vessel in every real sense—apart from bare technicalities—passed to the Crown by the requisition order, and remained in the Crown while the order was in force.

On these grounds I have no doubt that the *Comet* was a vessel belonging to His Majesty within the meaning of s. 557 of the Merchant Shipping Act, 1894, when the salvage services were rendered. I therefore pronounce that the Admiralty cannot claim salvage remuneration in respect of the services of the vessel herself.

(1) [1916] P. 306. (2) [1918] 2 K. B. 447.

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Some observations may be added upon the history of this subject as developed by legislative action since the passing of the Merchant Shipping Act, 1894. I shall take first an Act of Parliament. The Merchant Shipping (Salvage) Act, 1916, entitled ships belonging to His Majesty, if they answered certain descriptions, to claim salvage. If the proposition that the *Comet* was not a ship belonging to His Majesty was sound, it would follow that, even if she had been a vessel specially equipped with plant for salvage work, she would be excluded from the right to salvage money conferred upon such a vessel by that Act; and no one else could in the circumstances claim the salvage. It is not probable that this result could have been intended by the Legislature. The Act was passed after the decision of the Court of Appeal in *The Sarpen*. (1) A knowledge of that decision, and of what it necessarily involved, must be imputed to the Legislature. Its omniscience in such a case must not, at any rate technically, be doubted. From this aspect it is difficult to believe that it was intended to exclude from the benefit of the Act a vessel so completely in the service and under the control of the Admiralty on behalf of the Crown as the *Comet* was, merely on the ground that she was not a vessel belonging to His Majesty—if she had been otherwise entitled under the Act by reason of her equipment.

The other legislative action was taken by the less direct method of Orders in Council.

I have stated that the *Comet* was registered in the name of His Majesty as owner, represented by the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom. This was done under an Order in Council of March 22, 1911, promulgated under s. 80 of the Merchant Shipping Act, 1906. The material parts of this section are as follows: "(1.) His Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and those Acts, subject to any exceptions and modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in manner pro-

(1) [1916] P. 306.

vided by those Acts." "(3.) In this section the expression (Government ships) means ships not forming part of His Majesty's Navy which belong to His Majesty, or are held by any person on behalf of or for the benefit of the Crown, and for that reason cannot be registered under the principal Act." The Order prescribed the steps whereby registration of Government ships would be obtained by the Admiralty. And it contained the following clause: "15. Nothing in this Order in Council shall be construed as excluding Government ships in the service of the Admiralty from the category of ships belonging to His Majesty within the meaning of ss. 557 to 564 of the Principal Act, viz., the Act of 1894." In my opinion, it was beyond the power of His Majesty by any Order in Council made under the said section to declare what class of vessel was, or was not, within the category of ships dealt with by s. 557 of the 1894 Act; but the clause that I have just quoted indicates that the view of the advisers of the Crown was that ships in the service of the Admiralty and registered in the names of the Commissioners were included and should continue to be included in s. 557. Two other Orders in Council of later date were promulgated after the passing of the Act of 1916. They are the Orders of September 29, 1917, and June 4, 1918. They deal respectively with the registration of ships in the service of the Shipping Controller and of the War Office. They purport to exclude Government ships so registered from the category of ships belonging to His Majesty within the meaning of s. 557 of the 1894 Act.

It may have been, and probably was, the intention to rid such ships of the disability imposed by that section, and consequently to confer upon them the rights given by the 1916 Act. But this involved a confusion of thought, giving rise to a misapprehension. If the ships were excluded from the category of ships belonging to His Majesty they would not come under the same description in the 1916 Act. What was intended to be done probably was to provide that ships within such category would be relieved of their disability to recover salvage if they were tugs, or equipped as described in the 1916 Act; in other words, ships, although belonging to His Majesty, were intended to have the benefit of the 1916 Act, notwithstanding the provisions of s. 557 of the earlier Act.

But whatever the intention was, as I have already indicated, in

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my view s. 80 of the 1906 Act did not give any authority to the Crown by any Order in Council to affect the provisions of s. 557 of the 1894 Act.

I now leave the legal question as to the rights of the Admiralty to recover salvage ; but I propose when I state the awards to name a sum which I should award if they were entitled to any remuneration, so that an appellate tribunal, if appealed to, may be in possession of my provisional award, if this judgment on the legal question should be held to be erroneous.

It remains to deal with the claim of the owners, masters, and crews of the steamtugs *Nunthorpe* and *George Peabody*. The description of the work done is not really in dispute. There is, however, a controversy about the character of the services. The Admiralty in the statement of claim have introduced an alleged agreement between the masters of the *Comet* and the tug *Nunthorpe*. This has created a curious medley.

It was said that by such agreement the master of the *Nunthorpe* agreed to tow the *Matti* to Smith's Dock at Middlesbrough for 200*l*. ; and also to pay for a second tug, if it should be required. The agreement spoken to by the *Comet's* master in Court was one for towage from the Fairway Buoy to Smith's Dock. The *Nunthorpe* made fast about twelve miles to the southward of the Fairway Buoy. She made fast with the assistance of the second officer and two of the crew of the *Comet*, who had boarded the *Matti* with him. With the aid of the *Nunthorpe* the *Matti* was towed at a greater speed, and thereby she was got to the Fairway Buoy before dark, and to the dock in the Tees that evening. This enabled the *Comet* to cast off and bid farewell to the *Matti* at the Fairway Buoy and to pursue her own course.

The *George Peabody* was not engaged by the *Nunthorpe*, but made fast because the Tees pilot—who was then on board the *Matti*—refused to take her up the river without a second tug. The *George Peabody* made fast with the assistance of the second officer and two of the crew of the *Comet* who were still on board the *Matti*. I believe that some agreement was made between the two masters. But in my view such agreement did not cover all the services rendered by the *Nunthorpe*, and did not affect the *George Peabody* at all.

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But assuming the existence of the agreement as alleged, what operation has it upon the rights of the parties in these proceedings ?

If the two masters had authority to bind their respective owners, the owners of the *Nunthorpe* could no doubt sue the Lords Commissioners of the Admiralty for the sum agreed to be paid if the contract had been performed, and the latter would have a cause of action against the former for any breach of the contract. But the owners of the *Nunthorpe* make no claim against the Commissioners ; indeed they have refused to accept payment of the contract sum, or to adopt the agreement whatever it was ; whereas the Commissioners do not, and could not, make any claim against the tug owners for any breach of contract. Whatever proceedings might be launched by the Commissioners against the tug owners, the owners of the *Matti* would be foreigners to and unaffected by them.

The agreement is put forward in some indefinite way, apparently in order to increase, or to prevent diminution of, the salvage remuneration claimed by the Admiralty. The sum named in the agreement is not claimed as expenses incurred in the salvage. It has not been, and will not be, paid. It could not, therefore, be added to the salvage remuneration of the Admiralty, even if they were entitled to any.

In another way it was alleged that the master of the *Comet* rendered a useful service to the defendants in making the agreement. It is as if he said to the owners of the *Matti*, " You ought to pay me more salvage money, because I agreed with the tug master to do part of the work for less than he would claim from you." But this cannot operate to the benefit of the defendants. Again, in the reply, it is pleaded that the Admiralty are entitled to some " remuneration or indemnity " from the defendants in respect of the agreement. What this means in law it is difficult to understand. The agreement alleged was said to be a contract for towage only.

Seizing upon the allegations of one set of salvors, the defendants pleaded to the claim of the tug owners that the tugs performed no salvage services, but only towage services under a specific contract, after the *Matti* had been brought into safety. If they were merely towage services, the master of the *Comet* had no right to bind the defendants to pay a sum more than tenfold the ordinary towage rates, or at all. The agreement, if for towage only, did not impose

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any contractual burden or confer any contractual rights on the defendants. Upon this head I find that the *Matti* had not been brought into a position of safety when the alleged agreement was made. In my opinion, there is no doubt that the services rendered by the tugs were of a salvage character, and that salvage remuneration must be awarded to them in the usual course.

I award to the master of the *Comet* the sum of 520*l.*, to the second officer who went on board the *Matti* the sum of 130*l.*, and to the rest of the crew of the *Comet* the sum of 270*l.*, in the distribution of which treble allowances have to be made to the two men who accompanied the second officer in boarding the *Matti*. If the Admiralty had been entitled to claim for the services of the vessel, the sum that I should have awarded would have been 3700*l.*

I award to the owners, masters, and crews of the tugs *Nunthorpe* and *George Peabody* respectively the sums of 400*l.* and 100*l.*

I have to administer the law as it stands; and the result is very favourable to the owners of the Norwegian vessel, because a valuable property has been saved to them at a small cost.

If there has been any increase in the costs owing to the Lords Commissioners of the Admiralty appearing as plaintiffs, in addition to the officers and crew, that will be taken into account upon taxation.

Solicitor for Lords Commissioners of the Admiralty and officers and crew of the *Comet*: *The Treasury Solicitor.*

Solicitors for owners, masters and crews of the tugs *Nunthorpe* and *George Peabody*: *Constant & Constant.*

Solicitors for defendants: *Thomas Cooper & Co.*

E. C. T.

ADMIRALTY.

1918
June 11;
July 16.

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[1917, fol. 957.]

Admiralty—Salvage—Assistance to Vessel under Convoy—Services rendered under Orders of Naval Escort—Acceptance under Protest.

The defendants' steamship *K.*, under convoy with other vessels, owing to engine trouble dropped behind the rest of the convoy. The plaintiffs' steamship *P.*, one of the vessels in the convoy, offered to tow the *K.*, and the commander of the escorting warship accepted the offer and ordered the *P.* to take the *K.* in tow. The *P.* went back to the *K.* and informed her master that, acting under orders, the *P.* was to take the *K.* in tow. The master of the *K.* accepted the services under protest, and the *P.* towed the *K.*, which was able to work sometimes both and sometimes one of her engines for a distance of 900 miles. The services enabled the *K.* to rejoin the convoy and to remain with it, thereby securing the protection of the escort against hostile attack:—

Held, that the *K.* being in danger, it was immaterial that the services were accepted under protest, or that the commander, whose orders the *K.* had to obey, had ordered her to be taken in tow, and that the plaintiffs were entitled to salvage remuneration.

Action of Salvage.

The plaintiffs were the owners, master, and crew of the steamship *Politician;* the defendants were the owners of the steamship *Kangaroo* and her freight.

The action was heard in camera. The facts, so far as suitable for publication, are summarized in the head-note and more fully set out in the judgment.

June 11. *Leck K.C.* and *D. Stephens* for the plaintiffs.

Bateson K.C. and *Balloch* for the defendants.

[In the course of the arguments, which are sufficiently stated in the judgment, *The Auguste Legembre* (1) and *The Sarpen* (2) were cited.]

Cur. adv. vult.

July 16. Hill J. In this case the plaintiffs, the owners, master, and crew of the steamship *Politician*, issued their writ claiming

(1) [1902] P. 123. (2) [1916] P. 306.

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salvage for services rendered to the *Kangaroo*, her cargo and freight, in October, 1917. The owners of the *Kangaroo* and her freight entered an appearance and have pleaded. The owners were the Government of the State of Western Australia, and I am glad to say they raised no objection to the jurisdiction of the Court. The cargo was owned by the French Government, who are not subject to the jurisdiction of the Court. Messrs. Thomas Cooper & Co., on behalf of the French Government, by letter of June 5, 1918, stated that the value of the cargo is correctly stated in the defence, and that the French Government were quite agreeable that the judge should deal with the matter as if the cargo owners were before the Court, but the letter continues: "Of course, no order can be made against the owners of the cargo for payment of salvage, but if you will communicate with us after the case has been dealt with in Court, we will then consider with you whether any payment shall be made so far as the cargo owners are concerned."

I am very glad that the French Government has adopted this attitude. I shall state a figure which I consider a proper award in respect of ship, freight and cargo, and I shall then pronounce a decree against ship and freight for so much of that figure as the value of ship and freight bears to the total value of ship, freight and cargo.

The *Politician* is a steamship of 7523 tons gross, 470 feet long, and about 3000 horse-power effective. She had a crew of eighty-nine hands all told, and a very valuable cargo. Ship and freight were of the value of 246,700*l.* and cargo of the value of 645,000*l.*—total 891,700*l.* The *Kangaroo* was a twin-screw motor-ship fitted with Diesel engines, of 4348 tons gross, and 365 feet long. Her value was 210,000*l.* The value of her grain cargo was 91,767*l.*, and the freight 32,198*l.*—total, 333,965*l.*

The *Politician* and *Kangaroo* formed part of a convoy under escort. On the afternoon of October 21, 1917, the *Kangaroo*, owing to engine trouble, dropped behind. The officer in charge of the escort was minded to take the *Kangaroo* in tow. The *Politician* offered to do so, and the commander approved. The *Politician* turned back, and, in the result assisted the *Kangaroo* for a period of six and a half days and while a distance of 906 miles was covered. The assistance consisted in first standing by on the evening of October 21 while

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preparations were made to tow, and subsequently, on the evening of October 23, when the hawsers parted and preparations were made to re-establish connection; secondly, in towing during periods when the engines of the *Kangaroo* were not working at all; and, thirdly, in towing with the assistance of one engine of the *Kangaroo* and for a short period of both engines of the *Kangaroo*. The towage without any assistance was for distances aggregating 190 miles, and the towage with assistance from the engines of the *Kangaroo* was for distances aggregating 716 miles. Substantially during these times only one engine of the *Kangaroo* was doing any effective work, and that not at full power.

The *Kangaroo* was undoubtedly in serious trouble with her engines. It is unnecessary to consider the story of the engines in detail. The substance is this. The so-called auxiliary engines are necessary to the working of the main engines which drive the ship, but both auxiliary engines need not be worked at one time. One of them, if in full working order, does all that is required. The low-pressure cooler of the port auxiliary engine broke down, and had to be put out of work. That did not destroy but it diminished the effective power of the port auxiliary. The starboard auxiliary broke down altogether. The port auxiliary continued able to work, but without giving sufficient compression to work both main engines. One main engine only being worked, and at reduced speed, the *Kangaroo* was, as the master's letter states, unable to keep up the speed of the convoy. If the port auxiliary had broken down, as the starboard auxiliary did, the ship would have been without motive power, and it is to be observed that, apart from the low-pressure cooler, which had to be put out of work, the port auxiliary was showing some other weakness. It did not, however, break down.

The effect of the engine defects was that the *Kangaroo* at the best could only proceed at a slow speed, and without assistance must have been left to make her way by herself to a port of refuge. The nearest port was Gibraltar, distance about 1000 miles. In times of peace this would not have mattered. The *Kangaroo* in time would have made a port of refuge; though even in times of peace it would have been a matter for serious consideration for her master whether he should continue depending on one engine, which was showing signs of weakness, or take the proffered help of a passing ship. But under

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war conditions it was obviously of importance to the *Kangaroo* that she should not be left to her own slow speed and her own unaided efforts. The service the *Politician* rendered her was that she enabled her to rejoin the convoy and its escort, and to keep with it. I do not say that there was no marine risk to the *Kangaroo;* I think there was some, but the chief risk was that of enemy attack. That risk was, in my opinion, a very real one. The *Politician*, with some assistance by reason of the escort and convoy reducing speed to enable the *Politician* and *Kangaroo* to catch them up, enabled the *Kangaroo* to secure the protection of the escort against that risk.

The service of the *Politician* was not, in my view, mere towage. It was a salvage service. But, except for its long duration, it was an easy service as such services go, for the *Kangaroo* was for a greater part of the time assisting with her own engine, and, except for a very short period, was able to steer. The weather was on the whole good. The hawser twice parted, once in manœuvring for a crossing ship and once in squally weather. On the 28th it parted again, and the escort then took the place of the *Politician* and completed the towage for a distance of about another 600 miles.

The *Politician* was at the start, and afterwards on occasion, without the protection of the escort, while standing by the *Kangaroo*. On overtaking the convoy some of her crew were ill, and a towage of this description involves considerable extra labour. The risk to the *Politician* was not great, but there was some risk, as there always must be, in making fast and turning a heavy ship, and for some time the *Politician* was without the protection of the escort, and was at all times, when fast to the *Kangaroo*, in an unfavourable position in case the enemy attacked. Some extra coal was burnt, a wire hawser was damaged, and a manilla rope lost. I say nothing about loss of time, which was about a day, for that was common to all the convoy.

The defendants, however, contend that the services were not salvage.

In the first place, they say there was no danger. I have already dealt with that. I think there was. It was not a mere expediting of the voyage of the *Kangaroo*, but considerably more.

Secondly, the defendants say that the service was not completed,

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and that the *Kangaroo*, when the escort took over the service, was in no better position as regards danger then when the *Politician* took her in tow. I cannot agree. She still had to face a part of the voyage, which was attended with war risk. But she had passed through 900 miles, which were also attended with war risk. The service, as a whole, was performed by the *Politician* and the escort in succession. Each part was valuable.

Thirdly, the defendants say that the service was not voluntary, because it was tendered and accepted only in obedience to the orders of the commander of the escort, whose orders both the *Politician* and the *Kangaroo* were bound to obey, and also because it was to the common interest of all the convoy that all should keep together.

I find as a fact (1.) that the master of the *Politician* offered to the commander of the escort that the *Politician* should tow, and that the commander of the escort accepted the offer; (2.) that the master of the *Politician* informed the master of the *Kangaroo* that the *Politician* was going to tow the *Kangaroo* by order of the commander; (3.) that the master of the *Kangaroo*, after inquiring what arrangement was to be made about salvage, accepted the services of the *Politician*, saying that he did so under protest, but he accepted them without any further protest.

I am advised, and I hold, that in the circumstances the master of the *Kangaroo* would have acted unreasonably in regard to the safety of his ship if he had not accepted them. Whatever the state of mind of the master of the *Kangaroo* when the *Politician* first came up—and at that time he expected that his engines would be all right shortly—it is clear that subsequently he was far from unwilling to have the help of the *Politician*, and rightly so.

In these circumstances I have no doubt that the service is a salvage service. It matters not that the *Politician* was acting under orders; as regards the *Kangaroo* she was a volunteer and, in truth, she received her orders only because she volunteered. It seems to me to matter as little that the *Kangaroo* accepted under orders or under protest. That may be an important fact in considering whether the *Kangaroo* was in risk. But when a ship, which is in risk, accepts a service, it is none the less an acceptance, and none the less a salvage service, because some one else whose orders the ship must obey has ordered the ship to accept, or because the acceptance is under

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protest. Ships in convoy, no doubt, owe duties to one another, but to tow gratuitously for 900 miles a ship in peril is not one of them.

I therefore hold that the *Politician* is entitled to salvage. The values are very large, and admit of a substantial award. The total which I should award if ship, freight, and cargo were before me would be 5,000*l.*, apportioned thus: owners of the *Politician*, 3333*l.*; master, 500*l.*; and crew, 1167*l.*

Applying this amount to the ship and freight only, which I treat as representing 72·5 per cent. of the whole value, I award as against ship and freight 3626*l.*, and apportion that as follows: owners of the *Politician*, 2417*l.*; master, 363*l.*; and crew, 846*l.*

If I had to apportion as against the cargo the remaining 1374*l.*, I should apportion it in the same way. The only judgment which I give is against ship and freight.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitor for defendants: *M. L. Moss.*

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June 26, 27, 28; *July* 31.

ADMIRALTY.

THE CLAN SUTHERLAND.

[1917, fols. 831 and 852; 1918, fol. 218.]

Admiralty—Salvage—Misconduct of Salvors—Thefts of salved Property—Effect on Co-salvors—Forfeiture and Diminution of Awards.

Embezzlement of salved property by the crew of a salving ship affects only those salvors who are party or privy to the thefts, or who by negligence have enabled the thefts to be committed or to be undetected.

In general, the consequence as regards those participating in or privy to the thefts is the total forfeiture of salvage, and, as regards those guilty of negligence, the forfeiture or diminution of the award.

Property to the value of over 1000*l.* was stolen by certain members of the crew of one of a number of ships which salved a torpedoed vessel after her crew had left her:—

Held—(1.) that, as the thefts were on such a large scale that they must have been known to the rest of the crew as well as to the guilty parties, all the crew had forfeited their right to salvage; (2.) that as the officers had not exercised due diligence to prevent or detect

the thefts they also would forfeit their rights; but (3.) that an exception would be made in the case of the first lieutenant and one other officer who rendered extremely valuable services and would accordingly be awarded salvage but diminished amounts.

CONSOLIDATED ACTION OF SALVAGE.

The plaintiffs were—(1.) the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom and the commanding officers and crews of His Majesty's tugs *Woonda* and *Fortitude;* (2.) the commanders, officers and crews of His Majesty's torpedo-boat destroyer *Bittern* and His Majesty's trawler *Lois,* and the widow and executrix of the late Captain Herbert Laurence Edwards, R.N., who, at the time in question, was King's Harbour-master at Plymouth; and (3.) the owners, master and crew of the steam tug *Boarhound.*

The defendants were the owners of the steamship *Clan Sutherland,* her cargo and freight.

The services, which are fully described in the judgment, consisted in towing the *Clan Sutherland* to Dartmouth Harbour after she had been torpedoed and was in a sinking condition. She was beached in the harbour on the afternoon of April 18, 1917. The salvors then left her, but a watchman sent by the Customs remained on board and the Customs Preventive officer visited her from time to time. The master and crew had been taken off the sinking vessel before the towage began and had been put ashore at Plymouth, and the Admiralty authorities refused permission for them to return to their vessel until the 20th. When they were allowed to come on board and take possession of her it was found that serious looting had taken place and that property of the value of over 1000*l.* had been removed. The defendants admitted that salvage services were rendered, but pleaded that, by reason of the misconduct and negligence, the salvors (other than the owners, master and crew of the tug *Boarhound*) had forfeited their right to salvage remuneration.

Aspinall K.C. and *C. R. Dunlop* for the first set of plaintiffs.

Laing K.C. and *Captain Maxwell Anderson R.N.* for the second set of plaintiffs.

A. E. Nelson for the third set of plaintiffs.

Bateson K.C. and *Balloch* for the defendants.

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[For the defendants it was contended that the *Clan Sutherland* was taken charge of by the salvors, and that while in their custody and under their control the vessel was looted in a disgraceful way; that the mere fact that the master and crew were refused permission to return to their vessel was sufficient to deprive the salvors of their right to salvage remuneration: *The Capella* (1); and that, although the evidence pointed to the conclusion that the actual persons guilty of the thefts were members of the crew of the *Bittern*, all the plaintiffs were tainted with the misconduct of their co-salvors and should forfeit their right to salvage. Reference was made to *The Duc d'Aumale* (2) on this point.

For the plaintiffs it was contended that, although undoubtedly a certain amount of looting had taken place, it was for the defendants to establish beyond all reasonable doubt who the guilty parties were and they had failed to do so. Further, there was no authority for the proposition that misconduct on the part of one set of salvors deprived the others of their right to salvage remuneration, and that, at any rate as regards the claim of the Lords Commissioners of the Admiralty, the maxim that "the King can do no wrong" applied; and, even assuming that some one in the employ of the Crown was guilty of misconduct or failed in his duty, the Admiralty's right to salvage under the Merchant Shipping (Salvage) Act, 1916, was unaffected, although possibly the defendants might have a remedy by means of a petition of right.]

Cur. adv. vult.

July 31. HILL J. read the following judgment:—This is a claim for salvage of the steamship *Clan Sutherland*, her cargo and freight on April 18, 1917, after the *Clan Sutherland* had been torpedoed in the English Channel. The services were short, but most effective. They saved the *Clan Sutherland* from total loss. The salvors brought in a sinking ship from off the Start, and put her on the mud above Kingswear.

There is, however, a very serious issue in the case, for it is alleged by the defendants that at some time between the time when the master and crew left the ship on the early morning of April 18 and

(1) [1892] P. 70. (2) [1904] P. 60.

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the time when the master was permitted by the Admiralty authorities at Dartmouth to return on board on April 20 there was stolen from the ship a very large number of articles, including clothes and other personal belongings from the cabins of the master, the officers, the engineers, the steward and the carpenter; a number of things from the chartroom and the engineers' stores, and from the Marconi room, and a quantity of china, cutlery, plate, linen, spirits, wine and tobacco from the saloon department. The lists of missing articles were put in, and were not disputed. The total value of the missing property was over 1000*l.* How this property came to be missing and the effect upon the claim for salvage have to be considered. There is a further issue in that it is alleged for the defendants that steps taken by the salvors (who as regards this matter were the *Bittern's* crew) increased the damage to the decks and bulkheads. That also has to be considered.

The claimants are (1.) the Lords Commissioners of the Admiralty in respect of His Majesty's tugs *Woonda* and *Fortitude*, and the officers and crews of those tugs; (2.) the commanders, officers and crews of His Majesty's torpedo-boat destroyer *Bittern* and His Majesty's armed trawler *Lois;* (3.) the personal representative of the late Captain Edwards; and (4.) the owners, master and crew of the tug *Boarhound*. The officers and crews of some other King's ships were named, but they did not claim.

I may say at once that no case in respect of the missing articles is pleaded or made against the *Boarhound*, and no case is made against Captain Edwards, counsel for the defendants saying that, logically, he should be affected by the conduct of the other salvors, but that the defendants do not press the logical conclusion as regards him.

The description of the salving vessels is as follows:—

Woonda, screw tug, 305 tons gross, 1050 horse-power effective, 18 hands, value 25,000*l.*

Fortitude, screw tug, 470 tons gross, 1200 horse-power effective, 33 hands, value 15,000*l.*

Bittern, torpedo-boat destroyer, complement 72, under command of Lieutenant Irving, R.N.R.

Lois, an armed trawler on patrol service, 125 tons gross, 18 hands.

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Boarhound, screw tug, 53 tons gross, 200 horse-power, seven hands, value 4000*l.*

Captain Edwards was King's Harbour-master at Plymouth.

The plaintiffs, who require the assent of the Admiralty to making their claims, have received it.

The *Clan Sutherland* is a screw steamship of 2820 tons gross and 326 feet long, and was homeward bound with cargo. She was of the value of 30,000*l.*; the cargo was of the value of 262,663*l.*, and the freight at risk, 42,080*l.*—a total of 334,743*l.*

On the evening of April 17 the *Clan Sutherland* was struck by a torpedo at the after end of No. 2 hold. The explosion made a hole 30 feet long in No. 2 hold. It also blew away the starboard side of the bridge and the starboard forward boat, and badly damaged the starboard side of the fidly deck. The engine-room was full of steam, which was blowing off somewhere. In No. 2 hold the water, of course, was level with the sea. By the time the ship was taken in she was drawing 19 feet aft and 28 feet forward, and there was a good deal of water in No. 1 hold. About fifty minutes after the blow an armed trawler, the *Zonia*, arrived and took off all hands, with the exception of some who had been drowned by the fall of a boat. The master was the last to leave the ship, and he says he only did so under the orders of the commander of the *Zonia*. He, however, wisely assented to the *Zonia* taking him and most of the survivors into Plymouth. The rest were picked up out of a boat by the *Flintshire*, which had come up. At 4.30 A.M. the *Lois* and *Flintshire* made fast, the *Lois* passing her wire by means of her boat, and attempted to tow. As these two trawlers could do nothing effective, the *Bittern*, with the *Woonda* and *Fortitude*, arrived shortly afterwards, and Lieutenant Irving took charge. The *Woonda* and *Fortitude* made fast ahead, with the *Lois* fast astern to steer. The *Flintshire* then left. The steering gear of the *Clan Sutherland* jammed. The wind was west-north-west, force 6 to 7. The *Fortitude* was unable to do effective work towing ahead, and her rope parted before long, and she stood by. The ship was first headed to get the shelter of the land, and then, as it was thought she would not keep afloat long enough to reach Plymouth, was headed for the Dart. The *Bittern* and *Fortitude* then made fast alongside, one on each side, and the *Woonda* continued towing ahead with the *Lois*

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astern to steer. At 1.15 P.M. the *Boarhound* arrived from Plymouth, bringing Captain Edwards, who took charge during the rest of the operations. The *Boarhound* was made fast to assist in getting up the Dart. It was not disputed that her services were correctly described in the statement of claim. The *Lois* left at the entrance to Dartmouth Harbour. At 3.5 P.M. on the same day, the 18th, the ship was grounded on the mud in 16 feet of water at low water.

It is unnecessary to go through all the details. It was a very valuable service, and very well rendered. As regards the service, the only thing that calls for further consideration is the defendants' allegation that the damage to the ship was increased by the fact that the swelling of coffee stowed in No. 2 hold burst the decks and strained the bulkheads, and that this was due to improper measures taken by the salvors and to the delay in permitting the return of the master on board. During the towage the salvors, seeing the decks beginning to give badly, instead of relieving the pressure by opening the hatch, further secured it by extra lashings on deck, the cargo on top of it. This was probably a mistaken measure, but it cannot be regarded as misconduct; and it is, I am advised, doubtful whether the damage to the decks and bulkheads was substantially sustained by reason of it. By the time the ship was grounded the pressure had burst the decks, and I am unable to find that the delay in letting the master on board increased the damage. I do not think this matter ought to affect the award.

There was a further point made by the defendants that the services of a Dartmouth pilot were at first improperly refused. It would have been better if a pilot had been taken at once, and if it had been done trouble which was experienced through fouling a buoy might have been avoided. But, on the evidence, it is not at all clear that the pilot, when he first offered to board the ship, offered himself as a pilot. I do not think this matter ought to affect the award.

Of the tugs, the *Woonda* rendered the most valuable and continuous service. The *Fortitude* was of little use till she was lashed alongside, and that was not until the shelter of the land was reached. The *Boarhound* rendered useful help in the narrow waters. The *Lois* gave the essential help common in these cases, of acting as an outside helm during the worst part of the towage. Lieutenant

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Irving was in charge during the most critical part of the operations, and carried them out with skill. His first lieutenant was on board the *Clan Sutherland* during the earlier part of the towage with a number of his men, and that number was gradually increased and they did all the work on board. Lieutenant Irving himself was on board the *Clan Sutherland* from the time the *Bittern* made fast alongside. Captain Edwards was in charge during the later part of the operations, when the difficulties of the entrance to the harbour had to be dealt with. A Dartmouth pilot was assisting for part of the time. I need not repeat what I have said in other cases as to the matters to be borne in mind in awarding salvage to the Admiralty for the use of Admiralty tugs, or to the masters and crews of such tugs, or to the commanders, officers and crews of other King's ships. Apart from the question of the missing property, the awards I should make would be as follows :—The Admiralty in respect of the *Woonda* and *Fortitude*, 6000*l.*; the master and crew of the *Woonda*, 360*l.*; the master and crew of the *Fortitude*, 330*l.*; the officers and crew of the *Bittern* (other than Lieutenant Irving), 900*l.*; Lieutenant Irving, 300*l.*; the officers and crew of the *Lois*, 360*l.*; the representative of Captain Edwards, 200*l.*; and the owners, master and crew of the *Boarhound*, 500*l.*

Then comes the more serious question, which has given me a great deal of anxiety—as to the missing property. The first question is, Was it stolen, and by whom ? The ship was placed on the mud in 16 feet of water at low water, and there left by the salvors at 5 P.M. on the 18th. The master, who had been taken into Plymouth, went to Dartmouth on the morning of the 19th. For some reason, which it is very difficult to understand, permission to return on board his ship was not granted him by the Admiralty authorities until the morning of the 20th. I can see no justification for that delay. The Admiralty are claiming as salvors, and the Admiralty had no more right to keep the ship out of the possession of the owners' master than any other salvors would have had. The cargo of the *Clan Sutherland* consisted in part of dutiable goods, and before the salvors left on the 18th the chief officer of Customs boarded her—not as a receiver of wrecks, for the ship was never put in his custody as receiver of wrecks—but for the protection of the Customs to prevent the removal of dutiable goods. From that

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time forward the Customs always had a watchman on board, and the Customs Preventive officer visited the ship at irregular intervals. There could be no better guarantee against the presence of unauthorized persons on board, or the removal of goods from the ship, than the fact that the Customs were there to see that nothing dutiable was removed. Lieutenant Irving says that before he left on the 18th he locked up all the doors of which he could find the keys.

I am satisfied upon the evidence that neither the master, nor officers, nor crew of the *Clan Sutherland* took their things with them, and that the missing property was still on board when the last of them left the ship. It was not taken by them, but by others. The inevitable conclusion is that it was removed from the ship between the time the master and crew left the *Clan Sutherland* and the time, 5 P.M. on the 18th, when the last of the salvors left her. During the interval no one had possession but the salvors, and no one but the salvors was on board except the pilot and the captain of the Royal Naval College and the Customs officers. No suggestion of thieving was, or can be, made against the pilot or the captain of the College, or the Customs officers.

The explosion, no doubt, had affected the cabins, especially the starboard side and the saloon. The master was blown out of his cabin, and Lieutenant Irving said that everything was in confusion. The repair account shows that a great deal of work had to be done to the saloon. The explosion may account for some of the loss. The crockery, for instance, in the saloon may have been blown to pieces, but the total disappearance of most of the missing articles cannot be put down to the explosion, and no one at the trial sought to attribute it to anything else but intentional removal. I am forced, most unwillingly, to the conclusion that it was done by some of the salvors. There is, in addition, some, though not very much, evidence directly implicating some of the crew of the *Bittern*. The pilot, whose evidence I accept, left the ship shortly after she was put on the mud, crossing the *Bittern* to do so. He saw three men, who looked like stokers, each passing a bundle to men on the *Bittern*, while others were standing round on the ship. So far as opportunities were concerned, the *Lois* put two men on board to make fast that ship and the *Flintshire*, when they tried to tow. They were on board, it is said, for ten minutes only. After the *Bittern*

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and the tugs arrived, the *Lois* was fast astern and left at the entrance of the harbour. There is, in my judgment, no evidence upon which I can find any one from the *Lois* guilty. The *Woonda* never put any men on board. She was made fast by men from the *Bittern*, and the men from that ship passed the anchor to the *Woonda*. There is no evidence on which I can find any one from the *Woonda* guilty. The *Fortitude* was like the *Woonda*, except that for several hours the *Fortitude* was fast alongside, but there is no evidence that any of her men were on board; the evidence is to the contrary. There is no evidence on which I can find any one from the *Fortitude* guilty. The *Bittern* had a number of men on board from the time she came up, and the number was gradually increased. While towing alongside there were twenty, and at the last forty, according to Lieutenant Irving. Men from the *Bittern* did all the work on board, and no doubt the first lieutenant and Lieutenant Irving had a great deal to do.

I have hesitated long to find men from the *Bittern* guilty, the more so because they have since lost their lives in the service of their country. But, in my judgment, there is no other alternative. I find that the defendants have established beyond all reasonable doubt that there was thieving on a large scale from the *Clan Sutherland* by men belonging to the crew of the *Bittern*, and I find, further, that it was on such a scale that it must have been known, either at the time or afterwards, to the rest of the crew. It can only have escaped the knowledge of Lieutenant Irving and his officers because they did not exercise reasonable diligence to prevent it and to detect it.

I have little doubt that every one supposed the *Clan Sutherland* was sinking, and was little likely to be salved. And, but for that, I cannot think the property would have been removed. But with whatever indulgence one might look upon the circumstance that goods are removed, and are not afterwards concealed, but are given up, yet if the Court does find that they are removed and no attempt to give them up is made, I think the Court is bound to take a very strict view in such circumstances.

As to the persons actually engaged in or privy to the theft, there can be no doubt at all that the result is forfeiture of salvage. The law which rewards salvors, not on a basis of a quantum meruit, but

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with a liberal compensation to encourage the saving of property at sea, requires of them the strictest honesty in regard to the property while in their possession. As was said by Story J. in the case of *The Boston* (1), "It will be found, I believe, in the maritime jurisprudence of the whole world, that embezzlement by salvors, directly, or by connivance, is punished by a forfeiture of all claim to salvage. In morals, in general justice, in sound policy, it should be so; for what can be more inhuman, or more thoroughly without apology, than to plunder the distressed, or to add the losses of fraud to the unavoidable calamities of shipwreck? In the American and English law the doctrine is fully recognised; and it is applied with an unfaltering firmness, whenever the fact is clearly established." He further says that the party who seeks the aid of the Court must "come with clean hands. In cases of salvage, the party founds himself upon a meritorious service, and upon the implied understanding that he brings before the Court, for its final award, all the property saved with entire good faith; and he asks a compensation for the restoration of it uninjured, and unembezzled by him. . . . ." And again: "The compensation to be awarded presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach, or under the control, of the salvors."

No one will dispute that this correctly states the English law to-day as regards the actual thieves, and I conceive it also to correctly state the English law as regards those who are privy to the theft and connive at it. As was said by the judge of the Vice-Consular Admiralty Court of the Cape in the case of *The Scindia* (2), after finding embezzlement by the master of the salving ship, "I cannot separate the case of the crew from that of the master, because what was done by him was patent and open to every one, yet it was neither hinted at nor disclosed by any one of the crew."

Counsel for the defendants contended that the thefts by the crew of one of the salving ships affected all the salvors, and deprived all of any right to salvage. I do not agree. No authority was cited for that proposition. *The Scindia* (2) is an authority to the contrary, for in that case the owners of the salving ship recovered

(1) (1833) 1 Sumn. 328, 339, 341.

(2) (1865) 2 Asp. M. L. C. (O.S.) 232, 233.

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salvage notwithstanding the fraud of the master and the connivance of the crew. And in America there are several decisions which show that in case of embezzlement by the master neither owners nor innocent crew forfeit their share. *The Boston* (1) was such a case; and see *The Blaireau* (2); *The Rising Sun* (3); *The Missouri's Cargo.* (4) Indeed, the fraud is as much a fraud upon the owners of the salving vessel or the innocent members of the crew as upon the owners of the salved property. The case of *The Duc d'Aumale* (5), cited by counsel for the defendants, appears to me to have no bearing at all upon a case of embezzlement.

In my judgment, when embezzlement is proved, it affects only those salvors as to whom it is found that they participated in it or were privy to it, whether before or after the fact, and connived at it; or that they by their negligence enabled it to be done, or to be undetected. As to participators and privies, the consequence is in general forfeiture of salvage. There may be exceptional cases, as, for instance, if they repent and restore the abstracted property. Such cases must be dealt with according to their special circumstances. As to those who, by their negligence, enable it to be done, or to be undetected, the consequence is forfeiture or diminution of award, according to the view the Court takes of their conduct. Whether such negligence in a master affects the owners need not in this case be considered, and I desire not to decide it. There is no claim by the Crown as owner of the *Bittern*. But it does not affect other salvors as to whom there is no evidence upon which the Court can find either participation, or connivance, or negligence.

The only doubt I have in the application of these principles is as to the claim of Lieutenant Irving and his first lieutenant. I readily acquit Lieutenant Irving of actual knowledge of the thefts, but with proper supervision they ought to have been impossible, and ought to have been discovered. The first lieutenant was constantly engaged while he was on board the *Clan Sutherland*, and Lieutenant Irving was equally engaged. He says that when he went on board the *Clan Sutherland* he placed a sentry on each side of the ship; but, as I find proved, that was certainly not a

(1) 1 Sumn. 328.
(2) (1804) 2 Cranch, 240.
(3) (1837) Ware, 378.
(4) (1854) Sprague, 260.
(5) [1904] P. 60.

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sufficient protection. I am satisfied that no proper steps were taken either to prevent the thefts or to discover the stolen property, and that there was a serious neglect of that care and vigilance in the protection of the property which is to be expected of the officers of King's ships.

But I think, having regard to the extreme value of the services, that I shall be justified in allowing some reward to these two gentlemen, and I allow Lieutenant Irving 100*l.*, and the representative of the first lieutenant (since killed) 50*l.* But I can allow nothing to the other officers and crew of the *Bittern*.

The awards, therefore, will be—the Lords Commissioners of the Admiralty, 6000*l.*; master and crew of the *Woonda*, 360*l.*; master and crew of the *Fortitude*, 330*l.*; Lieutenant Irving, 100*l.*; and the representative of his first lieutenant, 50*l.*; the officers and crew of the *Lois*, 360*l.*; the representative of the late Captain Edwards, 200*l.*; and the owners, master and crew of the *Boarhound*, 500*l.* That makes a total award of 7900*l.*

Solicitor for the Lords Commissioners of the Admiralty and the commanders, officers and crews of the *Woonda* and *Fortitude*: *The Treasury Solicitor.*

Solicitor for the commanders, officers and crews of the *Bittern*, the *Lois*, and the widow of the late Captain Edwards: *Arthur Tyler, for Stillwell & Sons, Navy and Prize Agents.*

Solicitors for the owners, master and crew of the *Boarhound*: *Botterell & Roche, for Shelly & Johns, Plymouth.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

E. C. T.

C. A.
1918
April 16, 17, 26;
June 10;
July 22, 23.

[IN THE PROBATE, DIVORCE AND ADMIRALTY DIVISION AND IN THE COURT OF APPEAL.]

THE KINGSWAY.

[1915, fol. 284.]

Admiralty — Collision — Damages — Temporary Repairs — Unexecuted permanent Repairs—Demurrage—Prospective Loss by Detention.

The plaintiffs' steamship received damage in a collision for which the defendants' steamship was alone to blame. Sufficient repairs, which took four days, were effected to enable the vessel to continue her voyage. At the time the reference to assess the damages was held no permanent repairs had been effected, and it was improbable that any such repairs would be effected before the end of the war.

The district registrar allowed, in addition to the cost of the temporary repairs, (*a*) a sum for demurrage incurred by reason of the temporary repairs; (*b*) a sum in respect of the permanent repairs which would have to be done to restore the ship to the same condition as before the collision; and (*c*) a sum for the prospective loss of time during the execution of such repairs. The defendants appealed:—

Held—(*a*) that, although the permanent repairs had not been done, the plaintiffs had proved with reasonable certainty that they would be done; and (*b*) that the prospective loss of time which would be occupied in doing such repairs was a proper element to take into account in assessing damages. The grounds of objection therefore failed and the report would be confirmed.

Actual loss by detention includes prospective loss, but if repairs will never be effected, as e.g. if the ship has been lost, nothing can be allowed in respect of detention, for the shipowner can suffer no loss thereby.

Petition in objection to the report of the district registrar, Liverpool, on a reference to assess damages.

The plaintiffs, the Allan Steamship Company, were the owners of the steamship *Grampian;* the defendants were the owners of the steamship *Kingsway.*

On May 14, 1915, the two vessels came into collision in the Mersey, and on October 25, 1916, the President (Sir Samuel Evans) held the *Kingsway* alone to blame and referred the assessment of the damages to the district registrar.

The *Grampian,* a steamship of 10,995 tons gross, was, at the time

of the collision, bound from Liverpool to Canada with passengers, mails, and cargo. Her injuries necessitated her return to Liverpool, and it was recognized by all parties that the reasonable course to adopt was to effect temporary repairs only, and to defer the execution of permanent repairs to a later date. Temporary repairs were effected in four days, and on May 18 the *Grampian* proceeded on her voyage. In consequence of the delay she arrived back on her return voyage from Canada too late to sail on June 11, for which date she had been advertised, but she sailed on June 18, when the Allan Line would otherwise have had no vessel sailing. At the time the reference was held in August, 1917, no permanent repairs had been effected, and the evidence was that it was improbable any such repairs would be undertaken during the war.

The plaintiffs claimed, in addition to the cost of the temporary repairs, (*a*) four days' demurrage at 600*l.* per diem ; (*b*) the estimated cost of the permanent repairs, 2155*l.* ; (*c*) demurrage during permanent repairs, sixteen days at 600*l.* per diem, 9600*l.*

The district registrar allowed in respect of (*a*) 2380*l.* ; of (*b*) the amount claimed, 2155*l.* ; and of (*c*) 1600*l.* The defendants appealed.

R. A. Wright K.C. and *D. Stephens* for the defendants. The four days' demurrage during the temporary repairs should not be allowed as the plaintiffs could have substituted another vessel : see *The City of Peking* (1) ; and as the *Grampian* in fact made an additional sailing on an unadvertised date no loss of time was incurred.

As regards the permanent repairs, it does not follow that they will ever be done at all ; the chances of the ship being lost must be taken into account. It is not enough for the plaintiffs to prove a reasonable probability of future loss and expenses. There must be an actual loss and reasonable proof of its amount : *The City of Peking* (1) ; see also *The Clarence* (2) and *The Argentino.* (3) If a ship is made as seaworthy and as strong as before the collision a claim for depreciation is inadmissible : see Roscoe's Damages in Maritime Collisions, p. 62, and the American cases there cited of *The Rickmers* (4), *The*

(1) (1890) 15 App. Cas. 438.
(2) (1850) 3 W. Rob. 283.
(3) (1888) 13 P. D. 191.
(4) (1906) 142 Fed. Rep. 305.

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M'Ilvaine (1), and *The Loch Troon.* (2) The so-called temporary repairs made the *Grampian* as seaworthy and strong as before the collision, and no allowance should be made for permanent repairs. The defendants are thereby made to pay twice over. If the plaintiffs elect to repair to a less extent than on a basis of restitutio in integrum they thereby fix the ambit of their claim. Alternatively their rights are limited to the difference in value, if any, between the value of the ship as repaired and as completely restored: see *Pitman* v. *Universal Marine Insurance Co.* (3)

The sixteen days' demurrage is not recoverable, because the plaintiffs have failed to prove that it is a necessary loss which must happen in the ordinary course of events. The probabilities are that no demurrage for which the defendants are liable will ever be incurred, for, apart from the possibility of the vessel being lost, no prudent shipowner when his vessel was seaworthy would lay her up for sixteen days unless she were undergoing her No. 2 survey or had to do other necessary repairs.

It is submitted, although it is not necessary to go as far in the present case, that demurrage cannot be claimed until the repairs which involve the detention of the vessel have been done. If the vessel were sunk the plaintiffs would not be entitled to demurrage in respect of the estimated loss of time in doing repairs which could never be executed: see the recent case of *The Glenfinlas* (4), where the learned Admiralty Registrar allowed the estimated cost of permanent repairs to a vessel which had been lost after the collision but refused to allow anything in respect of demurrage. In the present case nothing but the cost of the repairs actually effected should have been allowed. *The Thuringia* (5) and *The Flying Fish* (6) are not authorities for the broad proposition laid down by the district registrar in the present case that "a plaintiff whose vessel has been injured in collision is entitled to recover from the wrong-doer demurrage as part of his damages notwithstanding the fact that repairs have not been, nor can at any time be, effected."

Laing K.C. and *C. R. Dunlop* for the plaintiffs. As regards the loss of four days while the temporary repairs were being executed,

(1) (1904) 126 Fed. Rep. 349.
(2) (1907) 150 Fed. Rep. 429.
(3) (1882) 9 Q. B. D. 192.
(4) See note, post, p. 363.
(5) (1872) 1 Asp. M. L. C. 283.
(6) (1865) Br. & Lush. 436.

although the *Grampian* did not in fact miss a sailing she has lost four days out of her working life which can never be regained. The ratio decidendi in *The City of Peking* (1) turned mainly on the facts: see Lord Halsbury's observations in *The Mediana* (2), in which he said he thought he had discovered the "clue" to the decision in *The City of Peking*. (1) The circumstances of the present case are quite different. As regards the permanent repairs, the plaintiffs are entitled to have their property made as good as it was before the collision. It was in the interest of all parties that merely temporary repairs were effected. Had permanent repairs been undertaken the defendants would have had to pay demurrage at a very high rate having regard to the earning capacity of ships at that time. The defendants forced the plaintiffs to file their claim and they cannot avoid paying for the result of their wrong-doing merely because at the time the reference was held the repairs necessary to restore the ship to her former condition had not been executed. The plaintiffs were bound to put forward all their damages, including future damages, as no second action arising out of the same cause of action would lie: *Fetter* v. *Beale* (3); *Mitchell* v. *Darley Main Colliery Co.* (4) It is well established that future damages are recoverable: *Hodsoll* v. *Stallebrass* (5); see also *The Endeavour*. (6) If it is reasonably certain that the repairs will be done, the plaintiffs are entitled to the estimated cost discounting something for the possibility that the vessel may not be in existence, and demurrage for the time such repairs would occupy follows as a matter of course. On all three grounds therefore the report of the district registrar was right and should be confirmed.

R. A. Wright K.C. replied.

Cur. adv. vult.

June 10. HILL J. read the following judgment:—The collision out of which this petition arises happened on May 14, 1915, between the plaintiffs' steamship *Grampian* and the defendants' steamship *Kingsway*. On October 25, 1916, the *Kingsway* was pronounced alone to blame, and the damages were referred in the usual way.

(1) 15 App. Cas. 438.
(2) [1900] A. C. 113, 119.
(3) (1699) 1 Salk. 11.
(4) (1884) 14 Q. B. D. 125.
(5) (1840) 11 Ad. & E. 301.
(6) (1890) 6 Asp. M. L. C. 511.

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The plaintiffs were minded to wait until the whole of the damages were definitely ascertained, which was not likely to be during the war. They, therefore, did not file a claim. The defendants thereupon applied by summons, saying that they objected to the reference being hung up indefinitely, and in July, 1917, I ordered the plaintiffs to file their claim. I mention this because, so far as the registrar has had to proceed upon an estimate of contingencies, instead of a consideration of ascertained facts, that is due to the action of the defendants. The reference was held at Liverpool before the district registrar and merchants, and on November 19, 1917, the registrar made his report. Each side gave notice of objection, but after the defendants had delivered their petition in objection the plaintiffs intimated that they would not proceed with their motion. The case, therefore, comes before me upon the defendants' petition only.

After the collision the *Grampian* put back to Liverpool, and certain repairs were done which occupied four days. The *Grampian* then resumed her trading in the Allan Line, to which she belonged, and she has ever since continued to trade either in the Allan Line or under requisition to the British Government.

The items to which the defendants take objection relate (1.) to the allowance for demurrage or loss of time incurred by reason of the repairs done in Liverpool in May, 1915; (2.) to an allowance for what is described as "permanent repairs"—that is, repairs not yet done, but which will have to be done if the ship is to be restored to the same condition as before the collision; and (3.) to an allowance for prospective loss of time during the execution of such permanent repairs.

As to the second head of objection, defendants, while saying that nothing at all ought to be allowed, contend in the alternative that what should be allowed is not the estimated cost of the repairs which remain to be done, but the difference in value in May, 1915, of the ship repaired as she was and the ship if repaired so as to be restored to the same condition as before the collision.

As to (1.), loss of time during temporary repairs, the defendants contend that the plaintiffs suffered no loss by reason of this detention of four days, because the *Grampian* was running in the Allan Line, which had sailings advertised for May 28, June 11, and June 25,

and the *Grampian*, after completing the voyage on which she was engaged at the time of the collision, missed indeed a sailing of June 11, for which she had been advertised, but made a sailing on June 18, on which day the Allan Line would otherwise have had no sailing. This argument ignores the fact that the *Grampian*, by reason of the repairs, lost four days out of her working life. She may or may not have obtained on June 18 the equivalent of the freights and passage moneys she would have obtained on June 11, but only at the expense of being a week late. That loss of the week could never have been made good; and it occurred at a time when, as the evidence proved and as is notorious, the demand for ship room, both for goods and passengers eastward bound, largely exceeded the supply. The defendants rely upon *The City of Peking*. (1) The decision in that case, as pointed out in *The Mediana* (2), turned upon the very special facts of the case. It appears to me to have no application to the present case, which is a case of the loss of the use for four days of a valuable freight-earning instrument, and that loss not made good to the plaintiffs by the defendants in any other way. I think the registrar was right in principle in allowing this item; and, in respect of it, I confirm the report.

As to (2.), the cost of permanent repairs, counsel for the defendants contended (*a*) that the plaintiffs elected to do the repairs done in May, 1915, instead of doing such repairs as would restore the ship to the same condition as before the collision, and (*b*) that, so repaired, the ship was as good a freight-earning instrument as before, and (*c*) that there was no certainty that the so-called "permanent repairs" would ever have to be done. I think these contentions are unsound. It was common ground in the evidence on both sides that the repairs effected in May, 1915, were not a complete restoration or a permanent repair, and that permanent repairs would have to be done some time. The registrar and merchants have treated the repairs done in May, 1915, as temporary repairs. In the face of the evidence, I cannot see how they could have done otherwise. Beside the verbal evidence, they had before them the survey reports, and the May, 1915, repair account and the estimate for the permanent repairs, and the registrar had the assistance of experienced merchants.

Even if I had all the material before me and the like assistance,

(1) 15 App. Cas. 438. (2) [1900] A. C. 113.

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I certainly should not be prepared to find, contrary to the evidence on both sides, that the repairs done in May, 1915, were a complete restoration, or that permanent repairs will not have to be done when it becomes possible to do them. Counsel for the defendants contends that the registrar has gone wrong because he has based his decision on the finding that there was an agreement by all parties that "in order to enable the *Grampian* to continue her interrupted voyage with as little delay as possible temporary repairs only should be effected, and that the execution of permanent repairs should be deferred"; and he says that there was no such agreement, but only an assent by the defendants' surveyors that what was done in May, 1915, was the proper thing to do. I do not think the registrar's decision is based only on an agreement; but there was evidence, uncontradicted, of such an agreement, and whether there was or was not an agreement, and whether the defendants' surveyors had or had not authority to bind the defendants, it is obvious that all parties recognized what was the reasonable, and probably the only possible, thing to do at the time, namely, to make the ship seaworthy and get her to sea again as soon as possible, and to postpone a complete restoration to a later time. It was obviously the right thing for the plaintiffs to do in order to minimize the loss, for a complete restoration in May, 1915, would have involved a delay of sixteen instead of four days, at a demurrage rate of over 600*l.* a day. It was obviously the right thing to do in the national interest. It was probably the only possible thing to do, for ships and repairing yards and materials were, even in May, 1915, very largely under the control of the Government, and it was highly improbable that the Government would permit the laying up of the *Grampian* for permanent repairs during the war if by temporary repairs she could in a much shorter time be made for the time being fit to keep the seas. The only witness for the defendants said that the authorities would not allow it.

These considerations also show that there was no election by the plaintiffs to do the repairs that were done, and no others. In all probability they had no choice, and, if they had one, the only choice they made was to choose the course which was best calculated to minimize the loss. In the result they got a ship which was for the time being fit to keep the seas, and which, in the urgent demand fo

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shipping caused by war conditions, could for the time being earn as much freight as if the ship had been completely restored, but they were left with a ship which was a patched ship, and one which needed to be permanently repaired when it became possible. Such a ship, if left as a patched ship when conditions are altered and the supply of shipping becomes more equal to the demand, must obviously be at a disadvantage in the freight market, especially as the *Grampian* is a mail and passenger ship as well as a cargo ship.

The defendants contend that they ought not to pay twice over—once for temporary repairs, which make the ship seaworthy, and again for permanent repairs, which will restore the ship. But to give the owner whose ship has been wrongfully damaged only the cost of temporary repairs would be to give the wrong-doer the benefit of the effect of war conditions, which either made it impossible at once to effect a complete repair or made it reasonable for the owner to postpone a complete repair. War conditions make the loss greater, but the extra burden should fall upon the wrong-doer, and not upon the injured party.

Nor do I think the defendants right in their contention that if anything beyond the cost of temporary repairs is to be allowed, it can only be the diminution in value in May, 1915, by reason of the ship being repaired as she was instead of being completely restored. This contention is really based upon an election to do certain repairs, and, for the rest, to keep the ship unrepaired. There was no such election. But if the true test be the diminution in value, the only witness called for the defendants on the point arrived at his estimate of depreciation by taking the cost of permanent repairs and treating the value as depreciated to the extent of that cost. For the purposes of his estimate, he took the cost of permanent repairs as in May, 1915. But when it is once found that permanent repairs could not, or could not reasonably, be effected in May, 1915, there is no reason for taking their cost in May, 1915, as the standard; their probable cost at the time when it will be possible to effect them must be the standard. The matter is, therefore, in the same position, whether the true test is the probable cost of permanent repairs which remain to be done, or diminution in value by reason that permanent repairs have not been done.

For these reasons I think the registrar and merchants were right

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in allowing a claim in respect of the estimated cost of permanent repairs. The figure was for them and is not questioned. If it were estimated to-day, I daresay it would be higher. I confirm the report in respect of the items for permanent repairs.

There remains the more difficult question as to the allowance for loss of time and incidental expenses during permanent repairs. The registrar and merchants have allowed sixteen days at 100*l.* a day, with some further allowance for wages and marine insurance during the period of detention, and an allowance for incidental expenses. The defendants do not quarrel with the very low rate of 100*l.* a day, or the rate of the allowances for wages and insurance, or the question of the incidental expenses. But they contend that nothing can be allowed for detention, or anything incidental thereto, because, in fact, it has not been incurred, and because it is quite uncertain whether it will be incurred and equally uncertain whether, if incurred, it will entail any money loss to the plaintiffs. The registrar has expressed the opinion, based on *The Flying Fish* (1) and *The Thuringia* (2), that the plaintiffs are entitled to recover demurrage as part of the damages, "notwithstanding the fact that repairs have not been, nor can at any time be, effected." I do not think that those cases can be treated as an authority for that broad proposition. The arguments and judgments are not directed to the point now in issue. Nor do I think that broad proposition is sound. If it is certain that repairs cannot at any time be effected, as, for example, if the ship is at the time of the reference already lost unrepaired, nothing, in my opinion, can be allowed for detention. Such was the case of *The Glenfinlas* (3), recently before Mr. Registrar Roscoe, to which I was referred. If there neither has been, nor can be, detention during repairs, the owner can suffer no loss by reason of detention. On the other hand, unless I am bound by authority, I am not prepared to hold that the owner must fail in a claim for damages for detention during repairs, unless he proves that the detention has already been incurred. The passage in the judgment in *The Clarence* (4), which has been so often cited, and which was approved by the Judicial Committee in *The City of Peking* (5), lays

(1) Br. & Lush. 436.
(2) 1 Asp. M. L. C. 283.
(3) See note, post, p. 363.
(4) 3 W. Rob. 283.
(5) 15 App. Cas. 438, 442.

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it down that two things are absolutely necessary—actual loss and reasonable proof of the amount. Counsel for the defendants contend that " actual loss " by detention means loss by a detention already suffered. I do not so understand it.

In ordinary circumstances, by the time the reference is heard, the repairs have been executed and the detention can be proved as something which has happened. It was so in *The Clarence* (1) and in *The Argentino* (2), and in every case which I can recollect in my own experience. But even in ordinary times the writ in most cases has been issued before the detention has happened. And if the reference were held while the ship was still under repair, it cannot be that the registrar is forced to draw a line at the date of the reference and allow nothing for subsequent detention, even though it is certain to happen. " Actual loss " does, in my view, include prospective loss. And the question in each case is not whether the detention has already happened, or is prospective, but, Has the plaintiff proved a loss by " detention " ?—has he proved with that degree of certainty which the law requires, either that the ship has been detained and a money loss been thereby caused, or that the ship will be detained and a money loss will be thereby caused ; and has he, in either case, given reasonable proof upon which the amount of money loss can be found by the Court ? If that is not the true view, then plaintiffs in a damage action must either wait until the whole of the damages are ascertained by actual experience or forego so much of their damages as is still in the future, for the cause of action is one, and there can be only one recovery in respect of it, and the damages must be assessed once and for all. If they wait to bring their action plaintiffs have to bear in mind the limitation period of two years, and, apart from that, it is most desirable that damage actions should be tried as soon as possible after the happening of the collision. If they bring their action and obtain a decree of condemnation, and wait before carrying in their claim on a reference, they may be met with a demand and an order such as was made in the present case, and again it is most desirable that the reference should be heard as soon as may be after the decree of condemnation.

Counsel for the defendants further say, and it is their main contention, that there is no sufficient evidence upon which it can be

(1) 3 W. Rob. 283. (2) 13 P. D. 191.

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found that the permanent repairs will cause detention, or that, if they do, the detention will cause a money loss. I do not agree. It is proved that the permanent repairs are necessary, and will have to be done some time, and that they could not be done piecemeal. The estimate that they will take sixteen days was accepted by the registrar and merchants, and is justified by the evidence. The ship was due for her No. 2 survey about the end of 1917, and the work required to pass that survey was being done in 1917 between voyages, and she had, at the date of the reference, already been drydocked for that purpose. She is, therefore, not bound to be idle for her No. 2 survey after the war.

In my opinion the plaintiffs have proved with sufficient certainty that the ship will be laid up for permanent repairs for sixteen days. Of course, that is subject to the chance that she may be lost or that she may suffer other damage, and that the repair of that damage and the execution of the permanent repairs can be effected at the same time. But these chances, while they must be taken into account in fixing the amount of damages to be allowed, do not, in my opinion, make no damages recoverable. If they did, it would be difficult to see how, in any action of negligence whereby a person loses the use of his property or of himself, anything could be awarded for prospective loss, for the property may be destroyed, or he himself may die the next day. But undoubtedly, when proved with that degree of certainty which the law requires, prospective loss is a proper element in damages for negligence causing injury to property or to the person. These chances are matters to be weighed, but nothing more.

Then as to amount. The 100*l.* a day has been taken by the registrar and merchants because that was the Blue-book rate paid by the Government to the owners when the ship was under requisition. In May, 1915, the profit rate of the free ship was 600*l.* a day. It being reasonably certain that the detention for permanent repairs will not take place until after the war, requisitioning, whether under the Defence of the Realm Act Regulations or under the Royal prerogative and Blue-book rates, will have ceased to operate. Perhaps the chance of legislation to give some power to the Government to requisition or to fix rates after the war ought to be taken into account, but it is a pure speculation whether Parliament in its

wisdom will think the interests of the country served in times of peace by taking ships out of the control of shipowners, or will think it either prudent or just to limit freights, or divide the earnings of ships between the Government and owners.

On the other hand, it can hardly be doubted that for some considerable time after the conclusion of peace the demand for shipping will exceed the supply, and rates of freight be high—much higher than Blue-book rates, which were originally fixed in the autumn of 1914, before the war had begun to have any effect in increasing the demand relatively to the supply of shipping or in a resulting rise in freights.

Taking all these things and all the chances into consideration, I should myself have taken a much higher rate per day than 100*l.* as the probable loss of profit. As to the other items—wages, insurance, and incidentals—they have been estimated by the registrar and merchants, and there is no reason to think them over-estimated.

In the result the registrar and merchants have allowed 1600*l.*, plus the other smaller items, as the prospective damages by delay during permanent repairs. For reasons which I have stated, I do not agree with the principle on which the registrar proceeded. But, applying what I conceive to be the true principle, I think the amount awarded is a very moderate estimate of prospective loss established with reasonable certainty and discounted by a due consideration of all the chances.

I hesitated at one time as to whether I ought not to send the case back to the registrar and merchants on this matter of prospective detention. But the facts are before me, and as I think the amount allowed does not err on the side of excess, I think there is no advantage to be gained by not myself disposing of the whole case.

The report will be confirmed and the petition dismissed with costs.

The defendants appealed.

July 22, 23. *R. A. Wright K.C.* and *Lewis Noad* for the appellants.

Laing K.C. and *C. R. Dunlop* for the respondents.

[The arguments on behalf of the appellants were the same as in the Court below. The respondents were not called on.]

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PICKFORD L.J. From the first moment this appeal was opened I have been at a loss to know what was the question of principle we were asked to decide. In my opinion there is no question of principle involved in the case at all.

In the first place, I wish to say there is no special measure of damages applicable to a ship different from the measure of damages applicable to any other chattel. The nature of the thing damaged may give rise to more difficult questions in the assessment of damages, but it does not change the assessment in any way. That was expressed a long time ago in *The Argentino* (1), in a passage which, so far as I know, has never been challenged. In any case it has been cited with approval in this Court in a case heard as recently as last year, *The Philadelphia.* (2) In *The Argentino* (1) there is this passage: "A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone."

That states quite distinctly that the principle is the same. Sometimes it is called restitutio in integrum; sometimes it is called compensation for the loss suffered. It does not matter what it is called, the wrong-doer has got to pay the injured party compensation

(1) 13 P. D. 191, 201. (2) [1917] P. 101.

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for the damage he has done. Of course, there is a great difficulty very often in assessing that compensation, and the difficulty arises where the loss that has to be assessed is a loss which it is thought will arise in the future. The difficulties are very much lightened where all the facts are known, all the damage has been repaired, and it is only a matter of seeing how much the loss has been.

Really that is the reason why the difficulty has arisen in this case, because learned counsel have not been able to cite to us any case in which the reference held to assess compensation to the damaged ship has been held before the repairs have been done, and before the amount of the loss by detention could be ascertained absolutely; in fact, where the repairs have been done and the detention has taken place, there all the elements are present on which the actual damage can be ascertained.

In this case the Court has to look into the future and estimate, on an examination of the probable circumstances that will exist in the future, what will be the loss. It seems to be—I did not know it wa —a novelty in the assessment of damages in the Admiralty Court; it is an every-day estimate that has to be made in the common law Courts, and the difficulties of coming to a proper estimate are not difficulties of law or principle. They are difficulties of fact.

Now to turn to the actual circumstances of this case. The *Grampian*, an Allan liner, was damaged by the *Kingsway*. The Government would not allow her to be laid up in order to do permanent repairs; and, in addition, as is well known, the state of the shipyards and repair shops is such that it is extraordinarily difficult to get any permanent repairs done; and, therefore, as this vessel was not so damaged as to be unable to navigate, temporary repairs were done, she was made seaworthy, and is still working under Government requisition. Both the learned judge and the district registrar have found that was a reasonable and proper thing to do under the circumstances. There is nothing new in doing temporary repairs to make a ship seaworthy, and then doing permanent repairs afterwards; it arises constantly where the damage is done in a place where there are no proper facilities for permanent repairs.

The plaintiffs, according to the learned judge, wished the inquiry as to damages to stand over until the whole of their damages were definitely ascertained, which was not likely to be during the war.

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They, therefore, did not file a claim. The defendants thereupon applied by summons, saying they objected to the reference being hung up indefinitely, and in July, 1917, the learned judge ordered the plaintiffs to file their claim. It was under those circumstances that the reference took place, and that the inquiry arose as to what is to be allowed (if anything) for permanent repairs, and what is to be allowed (if anything) for detention of the ship.

Now, counsel for the appellants rather shrank from this proposition, that the result was to cut off the whole of the permanent repairs and the whole of the detention, even though it might, in the opinion of the Court, be likely to be, and almost certainly would be, incurred. They said : " You must prove your actual damage." It is quite true that in words that argument was applied only to the damages for detention. It seems to me it must apply to both cost of permanent repairs and damages for detention. Actual damage only is recoverable, and if actual damage means damage which can be ascertained in fact, upon circumstances which have already happened to make it ascertainable, both of these heads of damages must be eliminated. As I say, learned counsel shrank from such a proposition as that. It seems to me it cannot be maintained for a moment.

They argued that as regards detention, the claimants must show that a loss had been in fact incurred. That is to say they must show the ship had been in fact detained, and not only that, but had been detained for a time during which she would have been in profitable employment. That, again, means that the wrong-doer, who very properly has asked that the damages should be assessed at once, before the time for doing the permanent repairs has arrived, is to escape liability altogether, although in the opinion of the Court there will be detention during a time in which the ship might be earning, because the time has not yet arrived. That position seems to me to be wholly untenable.

I think the judge was quite right in the view he took. He took the view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had been in fact lost, as in the case of *The Glenfinlas* (1), and therefore the repairs never could be done, and there never could be a detention causing

(1) See note, post, p. 363.

loss of profitable employment to the shipowner at all, then these damages could not be recovered. When I say lost, I mean lost by some circumstances outside the collision. Suppose that after the collision damage she had been torpedoed or sunk by perils of the sea, then clearly the shipowner would not have suffered a loss by reason of detention during the effecting of permanent repairs, because he never would or could do them; and the vessel never could be, by reason of the accident, detained from profitable employment, because she had gone and never could get any profitable employment. But that is not this case.

In this case the ship is still there; she is still sailing the sea, and the judge was satisfied that the repairs would have to be done, and would be done, subject, of course, to the chance that the ship might be lost—that is a circumstance he would have to consider. He was satisfied also, and I think there was evidence on which he was entitled to be satisfied, that the ship would in all human probability be detained during the repairs for sixteen days, and that she during that time would have been able, if not detained, to have obtained profitable employment. These are all matters of fact he has to ascertain: Looking into the future, what is the proper compensation for these repairs and this detention which, in his opinion, would have to be done and would take place? He has to consider all the circumstances, all the chances, all the probabilities, and he has to assess the amount; and if he has done that, not acting on any wrong principle, it is not, it seems to me, for this Court to interfere with the assessment which has been arrived at by the registrar. The district registrar, I agree with the judge, has proceeded probably on a wrong principle with regard to detention. The judge has arrived at the same result by applying, in my opinion, the right principle, and if he has done that, then any small miscalculations, or even not very small miscalculations, are not things this Court ought to correct.

I think I am justified in saying, upon the judgment of the House of Lords in *The Marpessa* (1), it is not for this Court nor for the House of Lords nicely to weigh the conclusions of fact at which the registrar and the judge have arrived.

In my opinion, in this case they proceeded on a right principle.

(1) [1907] A. C. 241.

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The reasoning of Hill J. with regard to this matter of detention entirely satisfies me, and I should be content to adopt it. It seems to me quite sound. I think the decision is quite right, and the appeal should be dismissed with costs.

BANKES L.J. I agree. It seems to me this case is unarguable. When the question comes to be considered it is a pure question of law whether or not the learned district registrar and the learned judge had evidence before them on which they could properly come to the conclusion at which they arrived. When the case was first opened, the contention of Mr. Wright for the appellants, as a matter of law, was that neither the cost of doing the repairs nor an allowance for the time which it would be necessary to take to execute them was to be allowed. But gradually as the case proceeded it appeared that he was not contending and did not contend that the cost of the permanent repairs was not properly allowed, but he did argue strenuously that the time which would be occupied in doing these repairs ought not to be allowed. Eventually it came to this, that as a question of reasonable inference the repairs ought not to be allowed, because having regard to the experience which persons have who are accustomed to deal with ships and the employment of ships, it was obvious that if the owners of this vessel were reasonable they could choose a time for doing these repairs—which were not in their nature of a kind requiring the vessel to be dry docked or anything of that kind—when the vessel would be off hire, either by reason of her not having employment at the moment or by reason of the fact that the repairs could be done whilst she was being discharged ; and that therefore nothing should be given for detention. That was a pure question of evidence. It seems to me impossible to contend that as a matter of law the district registrar was not entitled to come to the conclusion he did upon the evidence before him. First of all as to the question of time. It was said that Messrs. Harland & Wolff's estimate was sixteen days, but that from these sixteen days must certainly be deducted five or six days, because the plaintiffs' witnesses admitted that repairs, which would occupy five or six days, could be done during the time she was loading. That is not really a correct reproduction of the witnesses' evidence. [His Lordship referred to the evidence on this point.] Under these circum-

stances and in face of the evidence to contend that as a matter of law the district registrar, who by the act of the defendants themselves was put in the position of being bound to estimate prospective damage,—because the defendants would not give the plaintiffs the opportunity of letting the reference stand over until it was seen whether or not they could not execute the repairs before bringing on the reference—could not find as he did. That contention seems to me impossible. I quite agree with the view taken by the learned judge, and I think the appeal fails.

SCRUTTON L.J. I gather from the earnestness with which this case was put before us by both counsel for the appellants that the Admiralty Court has hitherto been able to assess damages without being faced with the problem other Courts have been faced with every day—I was going to say for centuries—in assessing damage. It may be that owing to the peculiar circumstances of the war this problem presents itself for the first time to the Admiralty Court, but in my view the principles on which it should be settled have been determined for years by the principles of common law.

The *Grampian*, an Allan liner, was run into by another vessel which was in the wrong and which had to pay the damage. If at that time the repairs had been executed they would have cost about 1500*l.*, and would have taken sixteen days, and there would have been an award if they had been done at that time, apparently, on the finding, of some 600*l.* a day, and the owners of the wrong-doing vessel would have had to pay about 10,000*l.* under these two heads alone. If the repairs had been postponed simply for the convenience of the Allan liner she would not have been allowed to benefit by postponing the repairs. But the repairs were postponed, for reasons with which the owners of the *Grampian* had nothing to do, by the national emergency which prevented repairs being done in the shipyards at that time, except such temporary repairs as were absolutely necessary. Consequently temporary repairs were done, over which no question arises. The owners of the *Grampian* suggested the postponement of the reference in order that when their damages were actually ascertained they might recover. The defendants objected and forced on the reference. The result was that the reference came on at a time when the permanent repairs

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had not been done, and when it was not known under what conditions they would be done.

In the Courts of common law two things are perfectly clear. The first thing clear is that when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account, and when damages are being assessed for a tort which would include some disability of the person or thing injured it may be taken into account that before the damages come to be assessed the person or thing injured has ceased to exist, owing to circumstances not connected with the tort. A man is injured. His injuries would have lasted for a considerable time, but shortly after the tort he dies through causes not connected with the tort. The damage he actually suffered is then ascertainable at once, and does not have to be assessed prospectively. But supposing he does not die, then the problematical and prospective question of the injuries would be a matter to be taken into account. The result has to be arrived at as best one can on the probabilities. The other thing that is clear is that juries and tribunals frequently have to assess prospective damages which are not certain in the sense that it is not known exactly what is going to happen, and, as the damages are in the future, the reasonable probabilities on the evidence have to be dealt with. The reasonable probabilities in this case had to be assessed when the defendants forced on the reference, i.e. when the permanent repairs would be done, what they would cost, and under what exact circumstances they would be done. What was done with the permanent repairs was that the learned district registrar gave the cost of doing them as in July, 1917, and I should think he very likely gave a sum favourable to the plaintiffs in that case, but he has arrived at that as a proper measure, and there is no possible ground for interfering with the finding on fact.

Next, what has to be done about the loss of earnings of the ship while the repairs are being effected? That again is prospective. There is no certainty in it, one cannot be sure when the repairs are going to be done. One cannot be sure of the exact circumstances under which they may be effected, but one knows that, as Lord Bowen said, a ship is ordinarily a profit-earning vessel. Bearing that in view, and forming the best estimate he could as to the probabilities of the circumstances under which the work would be

done, the district registrar arrived at the conclusion that it would take sixteen days, and he allowed 100*l.* a day. Now it is said he ought to have estimated that the repairs would be done while the ship was being discharged. I am bound to say that strikes me, knowing something about it, as an exceedingly startling proposition. To have ship repairers working on plates on the vessel's side while the ordinary type of labourer is discharging over the side is likely, it seems to me, to lead to considerable friction, and is a very unlikely thing for the owners to do. The learned district registrar also arrived at the view that 100*l.* a day would be enough to meet the probable damage, because he apparently estimated that the repairs would yet be done while the ship was in requisition. I agree with Hill J. and should myself have given a much larger sum than 100*l.* My own opinion is that the defendants, who are grumbling at the amount, have got off uncommonly well. There is no ground for interfering with the judgment of the learned judge.

Appeal dismissed with costs.

Solicitors for plaintiffs: *Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Batesons, Warr & Wimshurst, Liverpool.*

Note.

THE GLENFINLAS [1917, fol. 365]. This reference to assess damages, heard by Mr. Registrar Roscoe assisted by merchants on December 12, 1917, arose out of a collision on March 4, 1917, between the plaintiffs' steamship *Western Coast* and the defendants' steamship *Glenfinlas*. The defendants admitted liability for the collision. Temporary repairs were effected to the *Western Coast* and an estimate was made for the permanent repairs. The vessel, however, was requisitioned by the Government; the permanent repairs were postponed; and the evidence given at the reference was that she would not have been repaired until after the war. On November 14, 1917, she struck a mine and sank.

The amount of the permanent repairs was agreed at 616*l.* 10*s.*, and it was admitted by the defendants that the plaintiffs were entitled to this sum. The plaintiffs also claimed the estimated cost of dry docking, and damages for detention for twelve days at 160*l.* a day. In respect of these items the defendants denied their liability.

As regards the estimate for dry docking the learned registrar said that it was clear law that the owner of a vessel in collision was entitled to the cost of the repairs although they had not been executed: *The*

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Endeavour (1), a case which had frequently been followed in the Registry. Such estimated cost was in fact the measure of an actual injury resulting in actual damage to the plaintiffs' property and was part of the cost of repairs. Accordingly, it should be allowed. As regards the damages for detention, however, they were in his opinion clearly inadmissible. Being purely consequential damages they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiffs' chattel. The principle to be applied was restitutio in integrum, and to give damages for a loss of time which had not occurred would be to act contrary to this maxim. The claim, therefore, for loss of the use of the vessel could not be allowed.

E. C. T.

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May 28; *June* 7.

DIVORCE.

HINES *v.* HINES AND BURDETT.

Divorce—Adultery of Petitioner—Discretion of Court—Dismissal of Petition—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The discretion given to a judge of the Divorce Division by s. 31 of the Matrimonial Causes Act, 1857, is uncontrolled. But the practice of the Court precludes its exercise in favour of a petitioner who has himself been guilty of adultery, except under very special circumstances.

THIS was the petition of William Edward Hines for dissolution of his marriage on account of his wife's adultery. The suit was undefended. The parties were married in February, 1907. There was one child of the marriage. In January, 1908, the petitioner was out of work and unable to support his wife. She left him and went to live with her mother. Soon afterwards she made the acquaintance of the co-respondent Burdett, and committed adultery with him. Then she went to live with him, and at the date of the hearing they had lived together for nine years as man and wife, and had had three illegitimate children, and they were still living together.

For five years after his wife left him the petitioner was guilty of no moral lapse. He then met an unmarried girl called Nellie Spencer and committed adultery with her, and ever since connection had habitually taken place between them up to and after the presentation of the petition. The petitioner had joined the Army in

(1) 6 Asp. M. L. C. 511.

1917, and from that date Nellie Spencer had received a separation allowance. The petitioner and Nellie Spencer were anxious to be married, and the respondent and co-respondent were living happily together, and only waiting for the pronouncement of a decree absolute in this case to be legally married.

J. W. Thatcher for the petitioner. The effect of s. 31 of the Matrimonial Causes Act, 1857, gives the Court an absolute discretion to make or withhold the decree if the petitioner has committed adultery during the marriage. The facts here make a very strong case for exercising that discretion in favour of the husband.

Cur. adv. vult.

June 7. McCARDIE J., after stating the facts, continued: Under these circumstances I am asked by Mr. Thatcher to exercise my discretion under s. 31 and to grant a decree nisi in spite of the adultery of the petitioner. It is proper to observe that although the petitioner's adultery was not stated in the petition, yet it was disclosed to the Court at the hearing with fulness, clearness, and frankness.

I desire to state emphatically that I am under no illusion as to what will follow if I refuse this decree. The petitioner will, I doubt not, continue his intimacy with Nellie Spencer and will become the father of more illegitimate children. The respondent, I doubt not, will continue her cohabitation with Burdett (whom she loves), and as a result their illegitimate family will probably be increased. The refusal of a decree will then result in continued immorality by four people and the recurring procreation of bastard offspring. The petitioner and the respondent, I am satisfied, will never live together again. Each has found a new and permanent attachment. If I am to regard only the interests of the parties actually concerned in the case, I can entertain no doubt that a decree of dissolution will benefit each of them. By such a decree an immoral connection would be replaced by lawful marriage, and lawful children would be born in the future instead of illegitimate issue. But I cannot create new principles of divorce law administration, nor am I entitled to ignore the cogent weight of judicial precedents. It may well be

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that the matrimonial legislation of the country calls for reform. In some systems of jurisprudence it is considered inexpedient to hold persons bound by the marriage tie when both have been guilty of adultery. But (as has been pointed out by Gorell Barnes P.) such is not the position adopted by the law of England which has to be administered in this Court: see *Evans* v. *Evans*. (1) That the power of the Divorce Court to dissolve marriage should be enlarged is a matter which I cannot regard. It is the function of a judge to administer the law. It is the function of Parliament to achieve such reform as may be needed. I am sitting to exercise a statutory jurisdiction, and I am bound to exert a judicial discretion.

It was strongly urged by Mr. Thatcher, for the petitioner, that my discretion is wholly unfettered. That such is the case has been recently and authoritatively decided by the Court of Appeal in *Wickins* v. *Wickins* (2) and *Holland* v. *Holland*. (3) Swinfen Eady M.R. in *Wickins* v. *Wickins* (2) said that the discretion permitted by s. 31 should be left as free as the Legislature had left it. The section did not prescribe or define limits within which alone it might be exercised, and, having regard to the varying circumstances of different cases, it would be very inexpedient for the Court to attempt to do so. But the exercise of a discretion, though unfettered, is not to be the mere exercise of caprice.

In *Rex* v. *Wilkes* (4) Lord Mansfield said: "Discretion, when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, and not by humour: it must not be arbitrary, vague and fanciful; but legal and regular."

In *In re Taylor* (5) Jessel M.R. said: "The discretion of the judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons."

In *Stoker* v. *Stoker* (6) Butt J. said in a short but cogent judgment: "I must not forget that the discretion given to me must be exercised judicially, not fancifully, or arbitrarily."

If then the discretion under s. 31 must be exercised in a judicial manner there arises the further question as to the matters to which the Court should have regard.

(1) [1906] P. 125, 133.
(2) Ante, p. 265.
(3) Ante, p. 273.
(4) (1770) 4 Burr. 2527, 2539.
(5) (1876) 4 Ch. D. 157, 160.
(6) (1889) 14 P. D. 60, 61.

Upon this point the weight of authority is unanimous. In *Constantinidi* v. *Constantinidi* (1) each member of the Court of Appeal dealt with the matter. Vaughan Williams L.J. said (2): "It is to be remembered that in the exercise of the powers conferred by the Divorce Acts the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively inter se, but also to the interests of society and public morality, which generally require that the relief and benefits the Courts have the power of giving under those Acts shall scarcely be given to those who themselves have been guilty of matrimonial infidelity." Stirling and Cozens-Hardy L.JJ. express substantially similar views.

An equally emphatic opinion was expressed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) in *Todd* v. *Todd*. (3)

In *Brooke* v. *Brooke* (4) Evans P. said: "The discretion conferred by the Act was, in my opinion, intended to be unfettered; though it should, no doubt, be exercised not capriciously but cautiously and carefully, and, as far as possible, consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality, and of decent society, which is a consideration that must not be forgotten." This statement of the position was expressly and cogently approved by the present Court of Appeal in *Holland* v. *Holland*. (5)

The decisions in *Wickins* v. *Wickins* (6) and *Holland* v. *Holland* (5) in no way impair the rule that the discretion under s. 31 must be exercised in a judicial manner, and those decisions would afford me no adequate justification for departing from the attitude taken and the views expressed by the distinguished judges who have considered the object and effect of s. 31.

Whatever my own feelings may be as to the need for an alteration of the Divorce laws, I cannot, under the guise of mere discretion, ignore or seek to impair the well-considered and authoritative views of many distinguished judges.

It is not possible to classify the cases in which the Court will

(1) [1905] P. 253.
(2) [1905] P. 270.
(3) (1907) 24 Times L. R. 28.
(4) [1912] P. 205, n.
(5) Ante, p. 273.
(6) Ante, p. 265.

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grant relief to one who has himself committed a matrimonial offence. The illustrations given by Lord Penzance in *Morgan* v. *Morgan* (1) are in no way exhaustive or final: see per Swinfen Eady M.R. in *Wickins* v. *Wickins*. (2) But I conceive that the basic view as to the true object and intent of the discretion given by s. 31 of the Act of 1857 is that expressed by Vaughan Williams L.J. in *Constantinidi* v. *Constantinidi* (3) where he said that the relief which the Courts can grant under the Divorce Acts "shall scarcely be given to those who themselves have been guilty of matrimonial infidelity." This is the principle which appears to run through all the cases, and, as pointed out by Barnes P. in *Evans* v. *Evans* (4), it seems probable that the discretion given by s. 31 was only intended to apply in exceptional cases.

Prima facie the matrimonial offence of one spouse will not excuse the matrimonial offence of the other spouse. This is the guiding rule, and it exists for the purpose of preventing, so far as possible, the commission of matrimonial wrongs. I may well quote the words of Barnes P. (5): "Is it to be said that in every case the husband or wife, as the case may be, is to be at liberty to commit adultery, and that if he or she is in a position to prove adultery against the other party to the marriage his or her own adultery is to be excused if the separation is due to the conduct of the other? This idea was repudiated by Sir Cresswell Cresswell in *Latour* v. *Latour* (6) and by Lord St. Helier in *Synge* v. *Synge*." (7)

I have read, I think, all the cases in which relief has been granted to a spouse who has himself or herself been guilty of a matrimonial offence.

I am glad to find that the illustrations given by Lord Penzance in *Morgan* v. *Morgan* (8) have been enlarged. But in each case of relief the circumstances have been exceptional. I need only refer to a few recent decisions. In *Woltereck* v. *Woltereck* (9) Evans P. granted relief to a husband who had been guilty of cruelty and (after his wife had left him) of a single act of adultery when these

(1) (1869) L. R. 1 P. & M. 644.
(2) Ante, p. 265.
(3) [1905] P. 253, 271.
(4) [1906] P. 128.
(5) [1906] P. 133.
(6) (1861) 2 Sw. & Tr. 524, 529.
(7) [1900] P. 180, 207.
(8) L. R. 1 P. & M. 644.
(9) [1912] P. 201.

offences had been condoned by the wife by subsequent cohabitation. So, too, in *Schofield* v. *Schofield* (1) Evans P. granted relief to a husband who had been living apart from his wife for some years and then committed a single act of adultery which resulted in the birth of a child. The facts in that case were most unusual. So, too, in *Firman* v. *Firman* (2) Evans P. exercised his discretion in favour of a wife (who had herself committed adultery) where the husband's conduct had conduced to such adultery. In *Clutterbuck* v. *Clutterbuck* (3) Horridge J. exercised his discretion in favour of a husband, a boy about nineteen years old, who had committed adultery on two isolated occasions when very depressed and in a state of despair by reason of his wife going away with the co-respondent and writing a letter saying that she was leaving him for ever.

The Court has undoubtedly increased its willingness to grant relief under s. 31. But the principle, in my view, still remains that exceptional circumstances only will lead the Court to overlook the matrimonial default of a petitioner. This principle does not rest on a mere ecclesiastical doctrine of compensatio or recriminatio. It is based on the general and cogent requirements of public morality, and the resultant duty of the Court to vindicate a high standard of matrimonial obligation.

The enforcement of this duty (save in exceptional circumstances) will create a standard which all may know and find it well to follow. If the rule be enfeebled by an unduly sensitive regard to the hardship of particular cases, then the spouse who has been guilty of matrimonial offences would stand upon a footing dangerously akin to that of a petitioner who is free from conjugal stain. It is better that occasional hardship should exist than that the permanent and supreme requirements of matrimonial morality should be relaxed.

It is still the guiding principle of this Court that they who seek matrimonial relief should themselves be free from matrimonial offence. This principle will be relaxed only in exceptional circumstances. In view of what I have said it is unnecessary to consider the question of delay in the present case.

(1) [1915] P. 207. (2) (1915) 32 Times L. R. 50.
(3) (1915) 31 Times L. R. 614.

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In the exercise of my judicial discretion, which is guided by the existing authorities and influenced by those considerations of public morality which are indicated in many judgments, I must here refuse relief.

The petition is therefore dismissed.

Solicitors: *Taylor, Rowley & Co.*

J. R. B.

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